William A. Lessa
Department of Anthropology
University of California
Los Angeles 24, California

JC
31
.M2
1889

VILLAGE-COMMUNITIES

IN THE

EAST AND WEST

WITH OTHER LECTURES, ADDRESSES, AND ESSAYS

BY THE SAME AUTHOR.

ANCIENT LAW. Its connections with the Early History of Society, and its Relation to Modern Ideas. 8vo, $3.50.

LECTURES ON THE EARLY HISTORY OF INSTITUTIONS. 8vo, $3.50.

VILLAGE COMMUNITIES IN THE EAST AND WEST, to which are added other LECTURES, ADDRESSES, AND ESSAYS. 8vo, $3.50.

DISSERTATIONS ON EARLY LAW AND CUSTOM. Chiefly selected from Lectures delivered at Oxford. 8vo, $3.50.

POPULAR GOVERNMENT: Four Essays. I. PROSPECTS OF POPULAR GOVERNMENT. II. NATURE OF DEMOCRACY. III. AGE OF PROGRESS. IV. CONSTITUTION OF THE UNITED STATES. 8vo, $2.75.

INTERNATIONAL LAW. A Series of Lectures delivered before the University of Cambridge, 1887. 8vo, $2.75.

SIR HENRY MAINE. A Brief Memoir of his Life. By the Right Hon. Sir M. E. GRANT DUFF, G.C.S.I. With some of his Indian Speeches and Minutes Selected and Edited by Whitley Stokes, D.C.L. With Portrait. 8vo, $3.50.

HENRY HOLT & CO., Publishers, New York.

VILLAGE-COMMUNITIES

IN THE

EAST AND WEST

SIX LECTURES DELIVERED AT OXFORD

TO WHICH ARE ADDED OTHER

LECTURES, ADDRESSES AND ESSAYS

BY

Sir HENRY SUMNER MAINE

K.C.S.I., LL.D., F.R.S.

AUTHOR OF "ANCIENT LAW" AND "THE EARLY HISTORY OF INSTITUTIONS."

NEW YORK

HENRY HOLT AND COMPANY

1889

AUTHOR'S EDITION.

PREFACE

TO THE

THIRD AND ENLARGED EDITION.

As a Third Edition of the Lectures constituting the volume on 'Village-Communities in the East and West' is now required, it has been thought desirable to add to them some other Lectures, Addresses, and Essays by the author. All of them, except the last, will be found to have a bearing on subjects treated of in the Lectures on Village-Communities.

The Rede Lecture, on the 'Effects of Observation of India on Modern European Thought,' has been published separately. The Essays on the 'Theory of Evidence' and on 'Roman Law and Legal Education' appeared respectively in the *Fortnightly Review* and in the *Cambridge Essays*. The three Addresses delivered by the author in the capacity of Vice-Chancellor of the University of Calcutta have not before been printed in this country.

LONDON: *February* 1876.

PREFACE

TO THE

FIRST EDITION OF 'VILLAGE-COMMUNITIES IN THE EAST AND WEST.'

The Six Lectures which follow were designed as an introduction to a considerably longer Course, of which the object was to point out the importance, in juridical enquiries, of increased attention to the phenomena of usage and legal thought which are observable in the East. The writer had not intended to print these Lectures at present; but it appeared to a part of his audience that their publication might possibly help to connect two special sets of investigations, each of which possesses great interest, but is apparently conducted in ignorance of its bearing on the other. The fragmentary character of the work must be pleaded in excuse for the non-performance of some promises which are given in the text, and for some digressions which, with reference to the main subject of discussion, may appear to be of unreasonable length.

The eminent German writers whose conclusions are briefly summarised in the Third and Fifth Lectures are comparatively little known in England, and a list of their principal works is given in the Second Appendix. For such knowledge of Indian phenomena as he possesses the writer is much indebted to the conversation of Lord Lawrence, whose capacity for the political direction of the natives of India was acquired by patient study of their ideas and usages during his early career. The principal statements made in the text concerning the Indian Village-Communities have been submitted to Sir George Campbell, now Lieut.-Governor of Bengal, who has been good enough to say that they coincide in the main with the results of his own experience and observation, which have been very extensive. No general assertions are likely to be true without large qualification of a country so vast as India, but every effort has been made to control the statements of each informant by those of others.

Some matter has been introduced into the Lectures which, for want of time, was omitted at their delivery.

February 1871.

CONTENTS.

LECTURE I.

THE EAST, AND THE STUDY OF JURISPRUDENCE.

Comparative Jurisprudence—Comparative and Historical Methods—The Past and the Present—Limits of Comparative Jurisprudence—Method of Comparison—Enquiries of Von Maurer—The Mark and English Law—Eastern and Western Communities—Characteristics of Indio-Modern Theories of Race—The Patriarchal Family—Barbarous Forms of the Family—Origin of Law in the Family—Village-Community—Law of Nature—Codified Brahminical Law—Feudal System—Conditions of Juridical Study—English Ignorance of India—Disappearance of Indian Phenomena—Influence of Western Ideas—Influence of Physical Science—Influence of British Empire . . . PAGE 1

LECTURE II.

THE SOURCES OF INDIAN LAW.

Indian Settlements—Settlement and Revenue Courts—The Civil Courts—The Indian Judicial System—The Supreme Courts—English Law in India—Indian Opinion on English Law—Locality of Custom—The Will of Bengal—Wills and Collective Property—A Modern Indian Will—The Sudder Court—Influence of Sudder Courts—Development of Hindoo Law—Effect of Juridical Commentaries—The Bar and English Law—Mahometan Law—The Pundits—Codified Hindoo Law—Varieties of Native Usage—The Written Law—Hindoo Widow's Estate—Preservation of Customary Law—Caste in India—Tradition—Different Forms of Tradition—Popular Ignorance of Law in England—The Experts and English Law—Indian and Teutonic Village Systems . 31

LECTURE III.

THE WESTERN VILLAGE-COMMUNITY

Antiquity of Indian Customary Law—Traditional Law—Analysis of a Law—Indian Conceptions of Law—English Influence on Legal Conceptions—Unwilling Assumption of Sovereignty—Influence of Courts of Justice—Change in Nature of Usage—Growth of Conception of Right—Influence of English Law—Connection of Eastern and Western Custom—Von Maurer—The Teutonic Village-Community—The Arable Mark—English Theories of Land-Law—The Arable Mark in England—Shifting Severalties—The Common Fields—Their Great Extent—Extract from Marshall—Scott on Udal Tenures—Commonty of Lauder—Peculiarities of Scottish Example—Vestiges of the Mark. PAGE 65

LECTURE IV.

THE EASTERN VILLAGE-COMMUNITY.

The Indian Village-Community—Mahometan Theory of Ownership—Land Settlement of Bengal—The Indian Proprietary Unit—The Indian Village—The Cultivated Land—The Growth of Custom—Water Rules—The Sources of Primitive Law—Customs of Re-partition—The Village—Secrecy of Family Life—Dislike of English Criminal Law—Fictions Attending Legislation—Village Rules—Origin of Indian Towns—Indian Capitals—The Village Waste—The Indian Wastes—The Government and the Wastes—The Village Council—Peaceful Character of Population—Hereditary Trades—Remuneration of Village Traders—The Outsiders—Absorption of Strangers by Community 103

LECTURE V.

THE PROCESS OF FEUDALISATION.

Feudalism—The Benefices—The Manor—The Manorial Group—New Condition of the Waste—Changes in the Grass-lands—The Free Tenants—Settlements of Villeins—The Manorial Courts—Encroachments of the Lord—Roman and Feudal Law—Causes of

Feudalisation—Growth of Suzerainties—Leading Families—Elements of Feudal System—Systematic Feudalism—Antiquarianism of Indian Politics—Political Results of Settlements—Various Forms of Settlement—Growth in Power of Official Holder—Mahometan Assumptions—Indian Schools of Opinion—Indian Forms of Property—The Headman—Property Recognised by the English—Absolute Ownership—Nature of Rights of Property—Development of Absolute Ownership—Vested Rights in India—The Feudalisation of Europe—Cultivation of Waste-land—Improvements in Tillage—Village-Communities and Customs—Customary Tillage—Servile Dependents of Villagers—Villages cease to absorb Strangers—Nasse's Work—The Statute of Devises—Rules for Construing Wills—Restraints on Testamentary Power . . . . PAGE 131

LECTURE VI.

THE EARLY HISTORY OF PRICE AND RENT.

Structure of Village-Communities—Divisions of the Community—Property within the Community—Traditions as to Rights—Exactions of Indian Sovereigns—Indian Rent—Difficulty of Question—Anglo-Indian Ideas—Customary and Competition Rents—The Protected Tenants—Indian and English Forms of Property—True Character of Problem—The Irish Clan—Rack-Rent paid by Strangers—Primitive Notions as to Price—Early Measure of Price—Basis of Political Economy—The Market—Markets and Neutrality—Influence of Market Law—Sentiments adverse to Political Economy—Primitive Commercial Principles—Influence of Carrying Trade—Price and Rent—Market for Land in England—New Information required—Village-Communities in America 175

The Effects of Observation of India on Modern European Thought (Rede Lecture) 203

Address to University of Calcutta, I. 240

Address to University of Calcutta, II. . . . 255

Address to University of Calcutta, III. . . . page 275

The Theory of Evidence 295

Roman Law and Legal Education 330

Appendices:—

I.—Minute recorded on October 1, 1868 . 387

II.—Recent German Works bearing on the subject of the Lectures on Village-Communities 398

Note A. 399

Index 403

VILLAGE-COMMUNITIES

IN THE

EAST AND WEST.

LECTURE I.

THE EAST, AND THE STUDY OF JURISPRUDENCE.

CONTENTS.

Comparative Jurisprudence—Comparative and Historical Methods—The Past and the Present—Limits of Comparative Jurisprudence—Method of Comparison—Enquiries of Von Maurer—The Mark and English Law—Eastern and Western Communities—Characteristics of Indio-Modern Theories of Race—The Patriarchal Family—Barbarous Forms of the Family—Origin of Law in the Family—Village-Community—Law of Nature—Codified Brahminical Law—Feudal System—Conditions of Juridical Study—English Ignorance of India—Disappearance of Indian Phenomena—Influence of Western Ideas—Influence of Physical Science—Influence of British Empire.

LECTURE I.

THE EAST, AND THE STUDY OF JURISPRUDENCE.

In the Academical Statute which defines the duties of the Professor of Jurisprudence, the branches of enquiry to which he is directed to address himself are described as the investigation of the history and principles of law, and the comparison of the laws of various communities. The Lectures to which I am about to ask your attention will deal in some detail with the relation of the customary law of the East, and more particularly of India, to the laws and usages, past and present, of other societies; but, as we are employed upon a subject—and this is a warning which cannot be too soon given—in which ambiguities of expression are extraordinarily common and extremely dangerous, I perhaps should state at once that the comparison which we shall be making will not constitute Comparative Jurisprudence in the sense in which those words are understood by most modern jurists, or in that which, I think, was intended by the authors of the statute. Comparative Jurisprudence in this last sense has not for its object to throw light upon

the history of law. Nor is it universally allowed that it throws light upon its philosophy or principles. What it does, is to take the legal systems of two distinct societies under some one head of law—as for example some one kind of Contract, or the department of Husband and Wife—and to compare these chapters of the systems under consideration. It takes the heads of law which it is examining at any point of their historical development, and does not affect to discuss their history, to which it is indifferent. What is the relation of Comparative Jurisprudence, thus understood, to the philosophy of law or the determination of legal principle, is a point on which there may be much difference of opinion. There is not a little in the writings of one of the greatest of modern juridical thinkers, John Austin, which seems to imply that the authors and expositors of civilised systems of law are constrained, by a sort of external compulsion, to think in a particular way on legal principles, and on the modes of arriving at juridical results. That is not my view; but it is a view which may deserve attentive consideration on some other occasion. It would, however, be universally admitted by competent jurists, that, if not the only function, the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law. It is found, as matter of fact, that when the legislators (and I here use the term in its largest sense) of dif-

ferent communities pursue, as they frequently do, the same end, the mechanism by which the end is attained is extremely dissimilar. In some systems of law, the preliminary assumptions made are much fewer and simpler than in others; the general propositions which include subsidiary rules are much more concise and at the same time more comprehensive, and the courses of legal reasoning are shorter and more direct. Hence, by the examination and comparison of laws, the most valuable materials are obtained for legal improvement. There is no branch of juridical enquiry more important than this, and none from which I expect that the laws of our country will ultimately derive more advantage, when it has thoroughly engrafted itself upon our legal education. Without any disparagement of the many unquestionable excellences of English law—the eminent good sense frequently exhibited in the results which it finally evolves, and the force and even the beauty of the judicial reasoning by which in many cases they are reached—it assuredly travels to its conclusions by a path more tortuous and more interrupted by fictions and unnecessary distinctions than any system of jurisprudence in the world. But great as is the influence which I expect to be exercised in this country by the study of Comparative Jurisprudence, it is not that which we have now in hand; and I think it is best taken up at that stage of legal education at

which the learner has just mastered a very difficult and complex body of positive law, like that of our own country. The student who has completed his professional studies is not unnaturally apt to believe in the necessity, and even in the sacredness, of all the technical rules which he has enabled himself to command; and just then, regard being had to the influence which every lawyer has over the development of law, it is useful to show him what shorter routes to his conclusions have been followed elsewhere as a matter of fact, and how much labour he might consequently have been spared.

The enquiry upon which we are engaged can only be said to belong to Comparative Jurisprudence, if the word 'comparative' be used as it is used in such expressions as 'Comparative Philology' and 'Comparative Mythology.' We shall examine a number of parallel phenomena with the view of establishing, if possible, that some of them are related to one another in the order of historical succession. I think I may venture to affirm that the Comparative Method, which has already been fruitful of such wonderful results, is not distinguishable in some of its applications from the Historical Method. We take a number of contemporary facts, ideas, and customs, and we infer the past form of those facts, ideas, and customs not only from historical records of that past form, but from examples of it which

have not yet died out of the world, and are still to be found in it. When in truth we have to some extent succeeded in freeing ourselves from that limited conception of the world and mankind, beyond which the most civilised societies and (I will add) some of the greatest thinkers do not always rise; when we gain something like an adequate idea of the vastness and variety of the phenomena of human society; when in particular we have learned not to exclude from our view of the earth and man those great and unexplored regions which we vaguely term the East, we find it to be not wholly a conceit or a paradox to say that the distinction between the Present and the Past disappears. Sometimes the Past *is* the Present; much more often it is removed from it by varying distances, which, however, cannot be estimated or expressed chronologically. Direct observation comes thus to the aid of historical enquiry, and historical enquiry to the help of direct observation. The characteristic difficulty of the historian is that recorded evidence, however sagaciously it may be examined and re-examined, can very rarely be added to; the characteristic error of the direct observer of unfamiliar social or juridical phenomena is to compare them too hastily with familiar phenomena apparently of the same kind. But the best contemporary historians, both of England and of Germany, are evidently striving to

increase their resources through the agency of the Comparative Method; and nobody can have been long in the East without perceiving and regretting that a great many conclusions, founded on patient personal study of Oriental usage and idea, are vitiated through the observer's want of acquaintance with some elementary facts of Western legal history.

I should, however, be making a very idle pretension if I held out a prospect of obtaining, by the application of the Comparative Method to jurisprudence, any results which, in point of interest or trustworthiness, are to be placed on a level with those which, for example, have been accomplished in Comparative Philology. To give only one reason, the phenomena of human society, laws and legal ideas, opinions and usages, are vastly more affected by external circumstances than language. They are much more at the mercy of individual volition, and consequently much more subject to change effected deliberately from without. The sense of expediency or convenience is not assuredly, as some great writers have contended, the only source of modification in law and usage; but still it undoubtedly is a cause of change, and an effective and powerful cause. The conditions of the convenient and expedient are, however, practically infinite, and nobody can reduce them to rule. And however mankind at certain stages of development may dislike to have their

usages changed, they always probably recognise certain constraining influences as sufficient reasons for submitting to new rules. There is no country, probably, in which Custom is so stable as it is in India; yet there, competing with the assumption that Custom is sacred and perpetual, is the very general admission that whatever the sovereign commands is Custom. The greatest caution must therefore be observed in all speculations on the inferences derivable from parallel usages. True, however, as this is, there is much to encourage further attention to the observed phenomena of custom and further observation of customs not yet examined. To take very recent instances, I know nothing more striking among Mr. Freeman's many contributions to our historical knowledge than his identification of the fragments of Teutonic society, organised on its primitive model, which are to be found in the Forest Cantons of Switzerland. This, indeed, is an example of an archaic *political* institution which has survived to our day. The usages which it has preserved are rather political than legal; or, to put it in another way, they belong to the domain of Public rather than to that of Private law. But to usages of this last class clearly belong those samples of ancient Teutonic agricultural customs and ancient Teutonic forms of property in land which Von Maurer has found to occur in the more backward parts of Germany. I

shall have to ask a good deal of your attention hereafter to the results announced by the eminent writer whom I have just named; at present I will confine myself to a brief indication of his method and conclusions and of their bearing on the undertaking we have in hand.

Von Maurer has written largely on the Law of the Mark or Township, and on the Law of the Manor. The Township (I state the matter in my own way) was an organised, self-acting group of Teutonic families, exercising a common proprietorship over a definite tract of land, its Mark, cultivating its domain on a common system, and sustaining itself by the produce. It is described by Tacitus in the 'Germany' as the 'vicus'; it is well known to have been the proprietary and even the political unit of the earliest English society; it is allowed to have existed among the Scandinavian races, and it survived to so late a date in the Orkney and Shetland Islands as to have attracted the personal notice of Walter Scott. In our own country it became absorbed in larger territorial aggregations, and, as the movements of these larger aggregations constitute the material of political history, the political historians have generally treated the Mark as having greatly lost its interest. Mr. Freeman speaks of the politics of the Mark as having become the politics of the parish vestry. But is it true that it has lost

its juridical, as it has lost its political importance? It cannot reasonably be doubted that the Family was the great source of personal law; are there any reasons for supposing that the larger groups, in which Families are found to have been primitively combined for the purposes of ownership over land, were to anything like the same extent the sources of proprietary law? So far as our own country is concerned, the ordinary text-books of our law suggest no such conclusion; since they practically trace our land-law to the customs of the Manor, and assume the Manor to have been a complete novelty introduced into the world during the process which is called the feudalisation of Europe. But the writings of Von Maurer, and of another learned German who has followed him, Nasse of Bonn, afford strong reason for thinking that this account of our legal history should be reviewed. The Mark has through a great part of Germany stamped itself plainly on land-law, on agricultural custom, and on the territorial distribution of landed property. Nasse has called attention to the vestiges of it which are still discoverable in England, and which, until recently, were to be found on all sides of us; and he seems to me to have at least raised a presumption that the Mark is the true source of some things which have never been satisfactorily explained in English real-property law

The work of Professor Nasse appears to me to

require some revision from an English professional lawyer; but, beyond attempting this, I should probably have left this subject in the hands of writers who have made it their own, if it were not for one circumstance. These writers are obviously unaware of the way in which Eastern phenomena confirm their account of the primitive Teutonic cultivating group, and may be used to extend it. The Village-Community of India exhibits resemblances to the Teutonic Township which are much too strong and numerous to be accidental; where it differs from the Township, the difference may be at least plausibly explained. It has the same double aspect of a group of families united by the assumption of common kinship, and of a company of persons exercising joint ownership over land. The domain which it occupies is distributed, if not in the same manner, upon the same principles; and the ideas which prevail within the group of the relations and duties of its members to one another appear to be substantially the same. But the Indian Village-Community is a living, and not a dead, institution. The causes which transformed the Mark into the Manor, though they may be traced in India, have operated very feebly; and over the greatest part of the country the Village-Community has not been absorbed in any larger collection of men or lost in a territorial area of wider extent. For fiscal and legal purposes it is the pro

prietary unit of large and populous provinces. It is under constant and careful observation, and the doubtful points which it exhibits are the subject of the most earnest discussion and of the most vehement controversy. No better example could therefore be given of the new material which the East, and especially India, furnishes to the juridical enquirer.

If an ancient society be conceived as a society in which are found existing phenomena of usage and legal thought which, if not identical with, wear a strong resemblance to certain other phenomena of the same kind which the Western World may be shown to have exhibited at periods here belonging chronologically to the Past, the East is certainly full of fragments of ancient society. Of these, the most instructive, because the most open to sustained observation, are to be found in India. The country is an assemblage of such fragments rather than an ancient society complete in itself. The apparent uniformity and even monotony which to the new comer are its most impressive characteristics, prove, on larger experience, to have been merely the cloudy outline produced by mental distance; and the observation of each succeeding year discloses a greater variety in usages and ideas which at first seemed everywhere identical. Yet there is a sense in which the first impressions of the Englishman in India are correct. Each individual in India is a slave to the customs of the

group to which he belongs; and the customs of the several groups, various as they are, do not differ from one another with that practically infinite variety of difference which is found in the habits and practices of the individual men and women who make up the modern societies of the civilised West. A great number of the bodies of custom observable in India are strikingly alike in their most important features, and leave no room for doubt that they have somehow been formed on some common model and pattern. After all that has been achieved in other departments of enquiry, there would be no great presumption in laying down, at least provisionally, that the tie which connects these various systems of native usage is the bond of common race between the men whose life is regulated by them. If I observe some caution in using that language on the subject of common race which has become almost popular among us, it is through consciousness of the ignorance under which we labour of the multitudinous and most interesting societies which envelope India on the North and East. Everybody who has a conception of the depth of this ignorance will be on his guard against any theory of the development or inter-connection of usage and primitive idea which makes any pretensions to completeness before these societies have been more accurately examined.

Let me at this point attempt to indicate to you the sort of instruction which India may be expected to yield to the student of historical jurisprudence. There are in the history of law certain epochs which appear to us, with such knowledge as we possess, to mark the beginning of distinct trains of legal ideas and distinct courses of practice. One of these is the formation of the Patriarchal Family, a group of men and women, children and slaves, of animate and inanimate property, all connected together by common subjection to the Paternal Power of the chief of the household. I need not here repeat to you the proot which I have attempted to give elsewhere, that a great part of the legal ideas of civilised races may be traced to this conception, and that the history of their development is the history of its slow unwinding. You may, however, be aware that some enquirers have of late shown themselves not satisfied to accept the Patriarchal Family as a primary fact in the history of society. Such disinclination is, I think, very far from unnatural. The Patriarchal Family is not a simple, but a highly complex group, and there is nothing in the superficial passions, habits, or tendencies of human nature which at all sufficiently accounts for it. If it is really to be accepted as a primary social fact, the explanation assuredly lies among the secrets and mysteries of our nature, not in any characteristics

which are on its surface. Again, under its best ascertained forms, the Family Group is in a high degree artificially constituted, since it is freely recruited by the adoption of strangers. All this justifies the hesitation which leads to further enquiry; and it has been strongly contended of late, that by investigation of the practices and ideas of existing savage races, at least two earlier stages of human society disclose themselves through which it passed before organising itself in Family Groups. In two separate volumes, each of them remarkably ingenious and interesting, Sir John Lubbock and Mr. McLennan conceive themselves to have shown that the first steps of mankind towards civilisation were taken from a condition in which assemblages of men followed practices which are not found to occur universally even in animal nature. Here I have only to observe that many of the phenomena of barbarism adverted to by these writers are found in India. The usages appealed to are the usages of certain tribes or races, sometimes called aboriginal, which have been driven into the inaccessible recesses of the widely extending mountain country on the north-east of India by the double pressure of Indian and Chinese civilisation, or which took refuge in the hilly regions of Central and Southern India from the conquest of Brahminical invaders, whether or not of Aryan descent. Many of these wild tribes have now for many years been

under British observation, and have indeed been administered by British Officers. The evidence, therefore, of their usages and ideas which is or may be forthcoming, is very superior indeed to the slippery testimony concerning savages which is gathered from travellers' tales. It is not my intention in the present lectures to examine the Indian evidence anew, but, now that we know what interest attaches to it, I venture to suggest that this evidence should be carefully re-examined on the spot. Much which I have personally heard in India bears out the caution which I gave as to the reserve with which all speculations on the antiquity of human usage should be received. Practices represented as of immemorial antiquity, and universally characteristic of the infancy of mankind, have been described to me as having been for the first time resorted to in our own days through the mere pressure of external circumstances or novel temptations.

Passing from these wild tribes to the more advanced assemblages of men to be found in India, it may be stated without any hesitation that the rest of the Indian evidence, whencesoever collected, gives colour to the theory of the origin of a great part of law in the Patriarchal Family. I may be able hereafter to establish, or at all events to raise a presumption, that many rules, of which nobody has hitherto discerned the historical beginnings, had

really their sources in certain incidents of the Patria Potestas, if the Indian evidence may be trusted. And upon that evidence many threads of connection between widely divided departments of law will emerge from the obscurity in which they have hitherto been hidden.

But the Patriarchal Family, when occupied with those agricultural pursuits which are the exclusive employment of many millions of men in India, is generally found as the unit of a larger natural group, the Village-Community. The Village-Community is in India itself the source of a land-law which, in bulk at all events, may be not unfairly compared with the real-property law of England. This law defines the relations to one another of the various sections of the group, and of the group itself to the Government, to other village-communities, and to certain persons who claim rights over it. The corresponding cultivating group of the Teutonic societies has undergone a transformation which forbids us to attribute to it, as a source of land-law, quite the same importance which belongs to the Indian Village-Community. But it is certainly possible to show that the transformation was neither so thorough as has been usually supposed, nor so utterly destructive of the features of the group in its primitive shape. When then the Teutonic group has been re-constructed by the help of observed Indian phenomena

—a process which will not be completed until both sets of facts have been more carefully examined than heretofore by men who are conscious of their bearing on one another—it is more than likely that we may be able to correct and amplify the received theories of the origin and significance of English real-property law.

Let me pass to another epoch in legal history. More than once, the jurisprudence of Western Europe has reached a stage at which the ideas which presided over the original body of rules are found to have been driven out and replaced by a wholly new group of notions, which have exercised a strong, and in some cases an exclusively controlling influence on all the subsequent modifications of the law. Such a period was arrived at in Roman law, when the theory of a Law of Nature substituted itself for the notions which lawyers and politicians had formed for themselves concerning the origin and sanctions of the rules which governed the ancient city. A similar displacement of the newer legal theory took place when the Roman law, long since affected in all its parts by the doctrine of Natural Law, became, for certain purposes and within certain limits, the Canon law—a source of modern law which has not yet been sufficiently explored. The more recent jurisprudence of the West has been too extensive to have been penetrated throughout by any new theory, but

it will not be difficult to point out that particular departments of law have come to be explained on moral principles which originally had nothing whatever to do with them, and that, once so explained, they have never shaken off the influence of these principles. This phenomenon may be shown to have occurred in India on a vast scale. The whole of the codified law of the country—that is, the law contained in the Code of Manu, and in the treatises of the various schools of commentators who have written on that code and greatly extended it—is theoretically connected together by certain definite ideas of a sacerdotal nature. But the most recent observation goes to prove that the portion of the law codified and the influence of this law are much less than was once supposed, and that large bodies of indigenous custom have grown up independently of the codified law. But on comparing the written and the unwritten law, it appears clearly that the sacerdotal notions which permeate the first have invaded it from without, and are of Brahminical origin. I shall have to advert to the curious circumstance that the influence of these Brahminical theories upon law has been rather increased than otherwise by the British dominion.

The beginning of the vast body of legal rules which, for want of a better name, we must call the feudal system, constitutes, for the West, the greatest epoch in

its legal history. The question of its origin, difficult enough in regard to those parts of Europe conquered by barbarian invaders which were inhabited by Romanised populations, seemed to be embarrassed with much greater difficulty when it had to be solved in respect of countries like England and Germany Proper, where the population was mainly of the same blood, and practised the same usages, as the conquerors of the Empire. The school of German writers, however, among whom Von Maurer is the most eminent, appears to me to have successfully generalised and completed the explanation given in respect of our country by English historical scholars, by showing that the primitive Teutonic proprietary system had everywhere a tendency, not produced from without, to modify itself in the direction of feudalism; so that influences partly of administrative origin and (so far as the Continent is concerned) partly traceable to Roman law may, so to speak, have been met half-way. It will be possible to strengthen these arguments by pointing out that the Indian system of property and tenure, closely resembling that which Maurer believes to be the ancient proprietary system of the Teutonic races, has occasionally, though not universally, undergone changes which bring it into something like harmony with European feudalism.

Such are a few of the topics of jurisprudence—touched upon, I must warn you, so slightly as to

give a very imperfect idea of their importance and instructiveness—upon which the observed phenomena of India may be expected to throw light. I shall make no apology for calling your attention to a line of investigation which perhaps shares in the bad reputation for dulness which attaches to all things Indian. Unfortunately, among the greatest obstacles to the study of jurisprudence from any point of view except the purely technical, is the necessity for preliminary attention to certain subjects which are conventionally regarded as uninteresting. Every man is under a temptation to overrate the importance of the subjects which have more than others occupied his own mind, but it certainly seems to me that two kinds of knowledge are indispensable, if the study of historical and philosophical jurisprudence is to be carried very far in England, knowledge of India, and knowledge of Roman law—of India, because it is the great repository of verifiable phenomena of ancient usage and ancient juridical thought—of Roman law, because, viewed in the whole course of its development, it connects these ancient usages and this ancient juridical thought with the legal ideas of our own day. Roman law has not perhaps as evil a reputation as it had ten or fifteen years ago, but proof in abundance that India is regarded as supremely uninteresting is furnished by Parliament, the press, and popular literature. Yet ignorance of

India is more discreditable to Englishmen than ignorance of Roman law, and it is at the same time more unintelligible in them. It is more discreditable, because it requires no very intimate acquaintance with contemporary foreign opinion to recognise the abiding truth of De Tocqueville's remark that the conquest and government of India are really the achievements which give England her place in the opinion of the world. They are romantic achievements in the history of a people which it is the fashion abroad to consider unromantic. The ignorance is moreover unintelligible, because knowledge on the subject is extremely plentiful and extremely accessible, since English society is full of men who have made it the study of a life pursued with an ardour of public spirit which would be exceptional even in the field of British domestic politics. The explanation is not, however, I think, far to seek. Indian knowledge and experience are represented in this country by men who go to India all but in boyhood, and return from it in the maturity of years. The language of administration and government in India is English, but through long employment upon administrative subjects, a technical language has been created, which contains far more novel and special terms than those who use it are commonly aware. Even, therefore, if the great Indian authorities who live among us were in perfect

mental contact with the rest of the community, they could only communicate their ideas through an imperfect medium. But it may be even doubted whether this mental contact exists. The men of whom I have spoken certainly underrate the ignorance of India which prevails in England on elementary points. If I could suppose myself to have an auditor of Indian experience, I should make him no apology for speaking on matters which would appear to him too elementary to deserve discussion ; since my conviction is that what is wanting to unveil the stores of interest contained in India is, first, some degree of sympathy with an ignorance which very few felicitous efforts have yet been made to dispel, and, next, the employment of phraseology not too highly specialised.

If, however, there are reasons why the jurist should apply himself to the study of Indian usage, there are still more urgent reasons why he should apply himself at once. Here, if anywhere, what has to be done must be done quickly. For this remarkable society, pregnant with interest at every point, and for the moment easily open to our observation, is undoubtedly passing away. Just as according to the Brahminical theory each of the Indian sacred rivers loses in time its sanctity, so India itself is gradually losing everything which is characteristic of it. I may illustrate the completeness of the trans-

formation which is proceeding by repeating what I have learned, on excellent authority, to be the opinion of the best native scholars: that in fifty years all knowledge of Sanscrit will have departed from India, or, if kept alive, will be kept alive by the reactive influence of Germany and England. Such assertions as these are not inconsistent with other statements which you are very likely to have heard from men who have passed a life in Indian administration. Native Indian society is doubtless as a whole very ignorant, very superstitious, very tenacious of usages which are not always wholesome. But no society in the world is so much at the mercy of the classes whom it regards as entitled by their intellectual or religious cultivation to dictate their opinions to others, and a contagion of ideas, spreading at a varying rate of progress, is gradually bringing these classes under the dominion of foreign modes of thought. Some of them may at present have been very slightly affected by the new influence; but then a comparatively slight infusion of foreign idea into indigenous notions is often enough to spoil them for scientific observation. I have had unusual opportunities of studying the mental condition of the educated class in one Indian province. Though it is so strongly Europeanised as to be no fair sample of native society taken as a whole, its peculiar stock of ideas is probably the chief source from which the influences proceed which

are more or less at work everywhere. Here there has been a complete revolution of thought, in literature, in taste, in morals, and in law. I can only compare it to the passion for the literature of Greece and Rome which overtook the Western World at the revival of letters; and yet the comparison does not altogether hold, since I must honestly admit that much which had a grandeur of its own is being replaced by a great deal which is poor and ignoble. But one special source of the power of Western ideas in India I mention with emphasis, because it is not as often recognised as it should be, even by men of Indian experience. These ideas are making their way into the East just at the period when they are themselves strongly under the influence of physical knowledge, and of the methods of physical science. Now, not only is all Oriental thought and literature embarrassed in all its walks by a weight of false physics, which at once gives a great advantage to all competing forms of knowledge, but it has a special difficulty in retaining its old interest. It is elaborately inaccurate, it is supremely and deliberately careless of all precision in magnitude, number, and time. But to a very quick and subtle-minded people, which has hitherto been denied any mental food but this, mere accuracy of thought is by itself an intellectual luxury of the very highest order.

It would be absurd to deny that the disintegration

of Eastern usage and thought is attributable to British dominion. Yet one account of the matter which is very likely to find favour with some Englishmen and many foreigners is certainly not true, or only true with the largest qualifications. The interference of the British Government has rarely taken the form of high-handed repression or contemptuous discouragement. The dominant theory has always been that the country ought to be governed in conformity with its own notions and customs; but the interpretation of these notions and customs has given rise to the widest differences of opinion, and it is the settled habit of the partisans of each opinion to charge their adversaries with disregard of native usage. The Englishman not personally familiar with India should always be on his guard against sweeping accusations of this sort, which often amount in reality to no more than the imputation of error on an extremely vague and difficult question, and possibly a question which is not to be solved by exclusively Indian experience. If I were to describe the feeling which is now strongest with some of the most energetic Indian administrators, I should be inclined to call it a fancy for reconstructing native Indian society upon a purely native model; a fancy which some would apparently indulge, even to the abnegation of all moral judgment. But the undertaking is not practicable. It is by its indirect and for the most

part unintended influence that the British power metamorphoses and dissolves the ideas and social forms underneath it; nor is there any expedient by which it can escape the duty of rebuilding upon its own principles that which it unwillingly destroys.

LECTURE IX.

THE SOURCES OF INDIAN LAW.

CONTENTS.

Indian Settlements—Settlement and Revenue Courts—The Civil Courts—The Indian Judicial System—The Supreme Courts—English Law in India—Indian Opinion on English Law—Locality of Custom—The Will of Bengal—Wills and Collective Property—A Modern Indian Will—The Sudder Court—Influence of Sudder Courts—Development of Hindoo Law—Effect of Juridical Commentaries—The Bar and English Law—Mahometan Law—The Pundits—Codified Hindoo Law—Varieties of Native Usage—The Written Law—Hindoo Widow's Estate—Preservation of Customary Law—Caste in India—Tradition—Different Forms of Tradition—Popular Ignorance of Law in England—The Experts and English Law—Indian and Teutonic Village Systems.

LECTURE II.

THE SOURCES OF INDIAN LAW.

THE bodies of customary law which exist in India have now and then been more or less popularly described by acute observers who were led to examine them by curiosity or official duty; but on the whole the best information we possess concerning native usage is that which has been obtained through judicial or quasi-judicial agency. The agency which I have here called 'quasi-judicial' belongs to a part of Anglo-Indian administration which is very little understood by Englishmen, but which is at the same time extremely interesting and instructive. Its origin and character may be described as follows—inadequately no doubt, but still without substantial inaccuracy.

The British Government, like all Eastern sovereigns, claims a large share of the produce of the soil, most of which, however, unlike other Eastern sovereigns, it returns to its subjects through the judicial and administrative services which it maintains, and

through the public works which it systematically executes. Some person, or class of persons, must of course be responsible to it for the due payment of this 'land-revenue,' and this person or class must have the power of collecting it from the other owners and cultivators of the soil. This double necessity, of determining the persons immediately responsible for its share of the profits of cultivation and of investing them with corresponding authority, has involved the British Indian Government, ever since the very infancy of its dominion, in what I believe to be the most arduous task which a government ever undertook. It has had not only to frame an entire law of land for a strange country, but to effect a complete register of the rights which the law confers on individuals and definite classes. When a province is first incorporated with the Empire, the first step is to effect a settlement or adjustment of the amount of rent claimable by the State. The functionaries charged with this duty are known as the Settlement Officers. They act under formal instructions from the provincial government which has deputed them; they communicate freely with it during their enquiries; and they wind them up with a Settlement Report, which is often a most comprehensive account of the new province, its history, its natural products, and above all the usages of its population. But the most important

object of the Settlement operations—not second even to the adjustment of the Government revenues—is to construct a 'Record of Rights,' which is a detailed register of all rights over the soil in the form in which they are believed to have existed on the eve of the conquest or annexation. Here it is that the duties of the Settlement Officers assume something of a judicial character. The persons who complain of any proposed entry on the register may insist on a formal hearing before it is made.

When the Record of Rights has been completed and the amount of Government revenue has been adjusted, the functions of the Settlement Officers are at an end, and do not revive until the period is closed for which the Settlement has been made. But, during the currency of this period, questions between the State and the payer of land-tax still continue to arise in considerable number, and it is found practically impossible to decide on such questions without occasionally adjudicating on private rights. Another quasi-judicial agency is therefore that of the functionaries who, individually or collectively, have jurisdiction in such disputes, and who are variously known as Revenue Officers, Revenue Courts, and Revenue Boards—expressions extremely apt to mislead the Englishman unused to Indian official documents. The Circulars and Instructions issued by their superiors to Settlement and Revenue officers, their Reports and

decisions on disputed points, constitute a whole literature of very great extent and variety, and of the utmost value and instructiveness. I am afraid I must add that the English reader, whose attention is not called to it by official duty, not unusually finds it very unattractive or even repulsive. But the reason I believe to be that the elementary knowledge which is the key to it has for the most part never been reduced to writing at all.

So far as the functions of the Settlement and Revenue Officers constitute a judicial agency, the jurisdiction exercised by them was at first established by the British Government not in its character of sovereign, but in its capacity of supreme landowner. It was merely intended to enforce the claim of the State with some degree of regularity and caution. The strictly judicial agency of which I spoke is that of the Civil Courts, which are very much what we understand in this country by ordinary Courts of Justice. Theoretically, whenever the Settlement or Revenue Courts decide a question of private right, there is almost always (I need not state the exceptions) an appeal from their decision tc the Civil Courts. Yet, taking India as a whole, these appeals are surprisingly few in comparison with the cases decided. This is one of the reasons why the literature of Settlement and Revenue operations is a fuller source of information concerning the

customs of ownership and tenure observed among the natives of India than the recorded decisions of the Civil Courts.

Yet, though the results of quasi-judicial agency in India are, on the whole, more instructive than the results of strictly judicial agency, the Indian Civil Courts have nevertheless been largely instrumental in bringing into light the juridical notions peculiar to the country, in contrasting them with the legal ideas of the Western world, and to a certain extent in subjecting them to a process of transmutation. For reasons which will appear as I proceed, it is desirable that I should give you some account of these courts. I will endeavour to do it briefly and only in outline.

All India at the present moment, with the exception of the most unsettled provinces, is under the jurisdiction of five High or Chief Courts. The difference between a High and Chief Court is merely technical, one being established by the Queen's Letters Patent, under an Act of Parliament, the other by an enactment of the Indian Legislature. Of these courts, three are considerably older than the rest, and are in fact almost as old as the British dominion in India. When, however, the texture of the jurisdiction of the High Courts which sit at Calcutta, Madras, and Bombay, is examined, it is seen to consist of two parts, having a different

history. An Indian lawyer expresses this by saying that the three older High Courts were formed by the fusion of the 'Supreme' and 'Sudder' Courts, words which have the same meaning, but which indicate very different tribunals.

The Supreme Courts, invested with special judicial powers over a limited territory attached to the three old fortified factories of the East India Company at Calcutta, Madras, and Bombay—or, as they were once called, and are still called officially, Fort William, Fort St. George, and Bombay Castle—may be shortly described as three offshoots from Westminster Hall planted in India. They were 'Courts of Record, exercising Civil, Criminal, Admiralty, and Ecclesiastical jurisdiction,' and their judges were barristers taken straight from the English Bar. Although a series of statutes and charters provided securities for the application of native law and usage to the cases of their native suitors, and though some of the best treatises on Hindoo law which we possess were written by Supreme Court judges, it would not be incorrect to say that on the eve of the enactment of the several Indian Codes, the bulk of the jurisprudence administered by the Supreme Courts consisted of English law, administered under English procedure. Lord Macaulay, in the famous essay on Warren Hastings, has vividly described the consternation which the most important of these courts

caused in its early days among the natives subject to its power; and there is no doubt that the establishment of a tribunal on similar principles would now-a-days be regarded as a measure of the utmost injustice and danger. Yet there is something to be said in mitigation of the condemnation which the Supreme Courts have received everywhere except in India. The great quantity of English law which had worked its way into their jurisprudence is doubtless to be partially accounted for by the extravagant estimate universally set by English lawyers upon their own system, until their complacency was rudely disturbed by Bentham; but at the same time the apparently inevitable displacement of native law and usage by English law, when the two sets of rules are in contact, is a phenomenon which may be observed over a great part of India at the present moment. The truth is that the written and customary law of such a society as the English found in India is not of a nature to bear the strict criteria applied by English lawyers. The rule is so vague as to seem capable of almost any interpretation, and the construction which in those days an English lawyer would place on it, would almost certainly be coloured by associations collected from English practice. The strong statements, too, which have been made concerning the unpopularity of these courts on their first establishment must be received with some caution

Unquestionably great and general dismay was caused by their civil procedure, conferring as it did powers of compelling the attendance of witnesses, and of arresting defendants both before and after judgment, which were quite foreign to the ideas of the country. There were constant complaints, too, of the application of the English law of forgery to India. It is true that, as regards the case which Lord Macaulay has sketched with such dramatic force, Nuncomar appears to me, upon the records of the proceedings, to have had quite as fair a trial as any Englishman of that day indicted for forgery would have had in England, and to have been treated with even more consideration by the Court. But the introduction of the law under which he suffered was felt as a general grievance, and there are many representations on the subject in the archives of the Indian Government. These archives, however, which have been recently examined, and in part published, seem to me to prove that the native citizens of Calcutta, so far from complaining of the civil law imported by the Supreme Court from Westminster Hall and of the bulk of the criminal law, actually learned to echo the complacent encomiums on its perfection which they heard from English Judges. The fact appears to me so well established that I venture to draw some inferences from it. One is of a political nature, and need not be dwelt on here. A nervous fear of altering native

custom has, ever since the terrible events of 1857, taken possession of Indian administrators; but the truth is the natives of India are not so wedded to their usages that they are not ready to surrender them for any tangible advantage, and in this case the even justice of these courts was evidently regarded as quite making up for the strangeness of the principles upon which they acted. Another conclusion is of more direct importance to the jurist. Complete and consistent in appearance as is the codified law of India, the law enunciated by Manu and by the Brahminical commentators on him, it embraces a far smaller portion of the whole law of India than was once supposed, and penetrates far less deeply among the people. What an Oriental is really attached to is his local custom, but that was felt to have been renounced by persons taking refuge at a distance from home, under the shelter of the British fortresses.

The chief interest of these Supreme Courts to the student of comparative jurisprudence arises from the powerful indirect influence exerted by them on the other courts which I mentioned, and with which eight years ago they were combined—the Sudder Courts. Nevertheless, some of the questions which have incidentally come before the Supreme Courts, or before the branch of the High Court which continues their jurisdiction, have thrown a good deal of light on the mutual play of Eastern and Western

legal thought in the British Indian Empire. The judges who presided over the most important of these courts very early recognised the existence of testamentary power among the Hindoos. It seems that, in the province of Lower Bengal, where the village-system had been greatly broken up, the head of the household had the power of disposing of his patrimony during life. Whether he could dispose of it at death, and thus execute a disposition in any way resembling a will, has always been a much disputed question—which, however, contemporary opinion rather inclines towards answering in the negative. However that may be, the power of making a will was soon firmly established among the Hindoos of Lower Bengal by, or through the influence of, the English lawyers who first entered the country. For a long time these wills, never very frequently used, were employed, as the testaments of Roman citizens can be shown to have been employed, merely to supplement the arrangements which, without them, would have been made by the law of intestate succession. But the native lawyers who practise in Calcutta live in an atmosphere strongly charged with English law, and wills drafted by them or at their instance, and exactly resembling the will of a great English landed proprietor, were coming in increasing numbers before the Courts, up to the time when the law of testamentary succession was finally simplified

and settled by a recent enactment of the Indian Legislature. In such wills the testator claimed to arrange a line of succession entirely for himself, not only providing for the enjoyment of the property by his descendants in such order as he pleased, but even excluding them, if he liked, altogether from the succession; and, in order to obtain his object, he also necessarily claimed to have the benefit of a number of fictions or artificial notions, which made their way into English law from feudal and even from scholastic sources. The most interesting of these wills was executed by a Brahmin of high lineage who made a fortune at the Calcutta Bar, and he aimed at disinheriting or excluding from the main line of succession a son who had embraced Christianity. The validity and effect of the instrument have yet to be declared by the Privy Council;[1] and all I can say without impropriety is that, in those parts of India in which the collective holding of property has not decayed as much as it has done in Lower Bengal, the liberty of testation claimed would clearly be foreign to the indigenous system of the country. That system is one of common enjoyment by village-communities, and, inside those communities, by families. The individual here has almost no power

[1] They have since been declared. See *Ganendro Mohun Tagore v. Rajah Jotendro Mohun Tagore and others*, Law Reports (Indian Appeals, 1874), p. 387.—(*Note to Third Edition.*)

of disposing of his property; even if he be chief of his household, the utmost he can do, as a rule, is to regulate the disposition of his property among his children within certain very narrow limits. But the power of free testamentary disposition implies the greatest latitude ever given in the history of the world to the volition or caprice of the individual. Independently, however, of all questions of substance, nothing could be more remarkable than the form of the will which I spoke of as having fallen under the jurisdiction of the tribunal which now represents the Supreme Court of Calcutta. Side by side by recitals, apparently intended to conceal the breach in the line of descent, by affirming that the testator had, while living, made suitable provision for the disinherited son, were clauses settling certain property in perpetuity on the idols of the family, and possibly meant to propitiate them for the irregularity in the performance of the *sacra* which the new devolution of the inheritance inevitably entailed. The testator formally stated that he and his brothers had failed in business, that all the property they had inherited had been lost in the disaster, and that the fortune of which he was disposing was acquired by his individual exertions. This was meant to take the funds with which the will dealt out of the Hindoo family system and to rebut the presumption that the gains of a brother belonged to the common stock

of the joint family. But these provisions referring to Hindoo joint property were followed by others creating joint estates on the English model; and here the testator employed legal terms only capable of being thoroughly understood by a person familiar with that extraordinary technical dialect expressing the incidents of joint-tenancy which the fathers of English law may be seriously suspected of having borrowed from the Divinity Schools of Oxford and Cambridge.

The other court which has been recently combined with the court I have been describing, retained to the last its native name of Sudder Court. It underwent some changes after its first establishment, but it may be roughly said to date from the assumption by the English of territorial sovereignty. When finally organised, it became the highest court of appellate jurisdiction from all the courts established in the territories dependent on the seat of government, saving always the Supreme Court, which had exclusive jurisdiction within the Presidency Town, or (as it might be called) the English metropolis. The nature of the local tribunals from which an appeal lay to the Sudder Court is a study by itself; and I must content myself with stating that the Indian judicial system at present resembles not the English but the French system; that a number of local courts are spread over the country, from each of which an appeal lies to some higher court, of

which the decisions are again appealable to the court, whether called Sudder or High Court, which stands at the apex. The Sudder Courts therefore decided in the last resort questions arising originally at some point or other of a vast territory, a territory in some cases containing a population equal to that of the largest European States. Except the Indian Settlement and Revenue Courts, which I began this Lecture by describing, no tribunal in the world has ever had to consider a greater variety of law and usage.

What that law and usage was, the Sudder Court used to ascertain with what some would call most conscientious accuracy and others the most technical narrowness. The judges of the Court were not lawyers, but the most learned civilians in the service of the East India Company, some of whom have left names dear to Oriental learning. They were strongly influenced by the Supreme Court which sat in their neighbourhood; but it is curious to watch the different effect which the methods of English law had on the two tribunals. At the touch of the Judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law-books. Under the hand of the Judges of the Sudder Courts, who had lived

since their boyhood among the people of the country, the native rules hardened, and contracted a rigidity which they never had in real native practice. The process was partly owing to their procedure, which they seem to have borrowed from the procedure of the English Court of Chancery, at that time a proverb at once of complexity and technical strictness. It has been said by an eminent Indian lawyer that, when the Judges of the Sudder Courts were first set to administer native law, they appear to have felt as if they had got into fairyland, so strange and grotesque were the legal principles on which they were called to act. But after a while they became accustomed to the new region, and began to behave themselves as if all were real and substantial. As a matter of fact, they acted as if they believed in it more than did its native inhabitants. Among the older records of their proceedings may be found injunctions, couched in the technical language of English Chancery pleadings, which forbid the priests of a particular temple to injure a rival fane by painting the face of their idol red instead of yellow, and decrees allowing the complaint of other priests that they were injured in property and repute because their neighbours rang a bell at a particular moment of their services. Much Brahminical ritual and not a little doctrine became the subject of decision. The Privy Council in London was once called upon to decide in ultimate appeal on the claims of rival

hierophants to have their palanquin carried cross-wise instead of length-wise ; and it is said that on another occasion the right to drive elephants through the narrow and crowded streets of one of the most sacred Indian cities, which was alleged to vest in a certain religious order as being in possession of a particular idol, was seriously disputed because the idol was cracked.

There is in truth but little doubt that, until education began to cause the natives of India to absorb Western ideas for themselves, the influence of the English rather retarded than hastened the mental development of the race. There are several departments of thought in which a slow modification of primitive notions and consequent alteration of practice may be seen to have been proceeding before we entered the country; but the signs of such change are exceptionally clear in jurisprudence, so far, that is to say, as Hindoo jurisprudence has been codified. Hindoo law is theoretically contained in Manu, but it is practically collected from the writings of the jurists who have commented on him and on one another. I need scarcely say that the mode of developing law which consists in the successive comments of jurisconsult upon jurisconsult, has played a very important part in legal history. The middle and later Roman law owes to it much more than to the imperial constitutions ; a great part of the Canon law has been created by it ; and, though it has been

a good deal checked of late years by the increased activity of formal legislatures, it is still the principal agency in extending and modifying the law of continental countries. It is worth observing that it is on the whole a liberalising process. Even so obstinate a subject-matter as Hindoo law, was visibly changed by it for the better. No doubt the dominant object of each successive Hindoo commentator is so to construe each rule of civil law as to make it appear that there is some sacerdotal reason for it; but, subject to this controlling aim, each of them leaves in the law after he has explained it, a stronger dose of common sense and a larger element of equity and reasonableness than he found in it as it came from the hands of his predecessors.

The methods of interpretation which the Sudder Courts borrowed from the Supreme Courts and which the Supreme Courts imported from Westminster Hall, put a stop to any natural growth and improvement of Hindoo law. As students of historical jurisprudence, we may be grateful to them for it; but I am clearly persuaded that, except where the Indian Legislature directly interfered—and of late it has interfered rather freely,—the English dominion of India at first placed the natives of the country under a less advanced regimen of civil law than they would have had if they had been left to themselves. The phenomenon seems to me one of considerable interest to the

jurist. Why is it that the English mode of developing law by decided cases tends less to improve and liberalise it than the interpretation of written law by successive commentators? Of the fact there seems no question. Even where the original written law is historically as near to us as are the French Codes, its development by text-writers is on the whole more rapid than that of English law by decided cases. The absence of any distinct check on the commentator and the natural limitations on the precision of language are among the causes of the liberty he enjoys; so also is the power which he exercises of dealing continuously with a whole branch of law; and so too are the facilities for taking his own course afforded him by inconsistencies between the dicta of his predecessors—inconsistencies which are so glaring in the case of the Hindoo lawyers, that they were long ago distributed into separate schools of juridical doctrine. The reason why a Bench of Judges, applying a set of principles and distinctions which are still to a great extent at large, should be as slow as English experience shows them to be in extension and innovation, is not at first sight apparent. But doubtless the secret lies in the control of the English Bench by professional opinion—a control exerted all the more stringently when the questions brought before the courts are merely insulated fragments of particular branches of law. English law is, in fact,

confided to the custody of a great corporation, of which the Bar, not the Judges, are far the largest and most influential part. The majority of the corporators watch over every single change in the body of principle deposited with them, and rebuke and practically disallow it, unless the departure from precedent is so slight as to be almost imperceptible.

Let us now consider what was the law which, under the name of native custom, the courts which I have been describing undertook to administer. I shall at present attend exclusively to the system which, as being the law of the enormous majority of the population, has a claim to be deemed the common-law of the country—Hindoo law. If I were technically describing the jurisdiction, I should have to include Mahometan law, and the very interesting customs of certain races who have stood apart from the main currents of Oriental conquest and civilisation, and are neither Mahometan nor Hindoo. Mahometan law, theoretically founded on the Koran, has really more interest for the jurist than has sometimes been supposed, for it has absorbed a number of foreign elements, which have been amalgamated by a very curious process with the mass of semi-religious rules; but the consideration of this may conveniently be postponed, as also the discussion of the outlying bodies of non-Hindoo usage found in various parts of the country.

The Hindoo law, then, to which the English in India first substantially confined their attention, consisted, first, of the Institutes of Manu, pretending to a divine inspiration, of which it is not easy to define the degree and quality, and, next, of the catena of commentators belonging to the juridical school admitted to prevail in the province for which each particular court was established. The Court did not in early times pretend to ascertain the law for itself, but took the opinion of certain native lawyers officially attached to the tribunal. But from the first there were some specially learned Englishmen on the bench who preferred to go for themselves to the fountains of law, and the practice of consulting the 'Pundits' was gradually discontinued. These Pundits laboured long under the suspicion, to a great degree unmerited, of having trafficked with their privileges, and having often, from corrupt motives, coined the law which they uttered as genuine. But the learned work of Mr. West and Professor Bühler, following on other enquiries, has gone far to exonerate them, as the greater part of their more important opinions have been traced to their source in recognised authorities. That they were never corrupt it is unfortunately never safe to affirm of Orientals of their time; but their opportunity was probably taken from the vagueness of the texts which they had to interpret. There are in fact certain dicta of Hindoo authorita-

tive commentators upon which almost any conclusion could be based.

The codified or written law of the Hindoos, then assumed to include their whole law, consisted of a large body of law regulating the relations of classes, especially in the matter of intermarriage; of a great body of family law, and a correspondingly extensive law of succession; and of a vast number of rules regulating the tenure of property by joint families, the effects on proprietary right of the division of those families, and the power of holding property independently of the family. There was some law of Contract and some law of Crime; but large departments of law were scantily represented, or not at all, and there was in particular a singular scarcity of rules relating specially to the tenure of land, and to the mutual rights of the various classes engaged in its cultivation. This last peculiarity was all the more striking because the real wealth of the country is, and always has been, agricultural, and the religious and social customs of the people, even as recorded in the codified law, savour strongly of agriculture as their principal occupation.

It would seem that doubts as to the relation of the codified or written law to the totality of native usage were entertained at a very early time, and collections were made of local rules which applied to the very points discussed by the Brahminical jurists,

and yet disposed of them in a very different manner. These doubts have steadily gained strength. I think I may venture to lay down generally, that the more exclusively an Anglo-Indian functionary has been employed in 'revenue' administration, and the further removed from great cities has been the scene of his labours, the greater is his hesitation in admitting that the law assumed to begin with Manu is, or ever has been, of universal application. I have also some reason to believe that the Judges of the newest of the High Courts, that established a few years ago for the provinces of the North-West in which primitive usage was from the first most carefully observed and most respected, are of opinion that they would do great injustice if they strictly and uniformly administered the formal written law. The conclusion arrived at by the persons who seem to me of highest authority is, *first*, that the codified law—Manu and his glossators—embraced originally a much smaller body of usage than had been imagined, and, *next*, that the customary rules, reduced to writing, have been very greatly altered by Brahminical expositors, constantly in spirit, sometimes in tenor. Indian law may be in fact affirmed to consist of a very great number of local bodies of usage, and of one set of customs, reduced to writing, pretending to a diviner authority than the rest, exercising consequently a great influence over them, and tending, if not checked

to absorb them. You must not understand that these bodies of custom are fundamentally distinct. They are all marked by the same general features, but there are considerable differences of detail; and the interest of these differences to the historical jurist is very great, for it is by their help that he is able chiefly to connect the customs of India with what appear to have been some of the oldest customs of Europe and the West.

As you would expect, the written law, having been exclusively set forth and explained by Brahmins, is principally distinguished from analogous local usages by additions and omissions for which sacerdotal reasons may be assigned. For instance, I have been assured from many quarters that one sweeping theory, which dominates the whole codified law, can barely be traced in the unwritten customs. It sounds like a jest to say that, according to the principles of Hindoo law, property is regarded as the means of paying a man's funeral expenses, but this is not so very untrue of the written law, concerning which the most dignified of the Indian Courts has recently laid down, after an elaborate examination of all the authorities, that 'the right of inheritance, according to Hindoo law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor.' There are also some remarkable differences between the written and unwritten law ir

their construction of the rights of widows. That the oppressive disabilities of widows found in modern Hindoo law, and especially the prohibition of re-marriage, have no authority from ancient records, has often been noticed. The re-marriage of widows is not a subject on which unwritten usage can be expected to throw much light, for the Brahminical law has generally prevailed in respect of personal family relations, but the unwritten law of property, which largely differs from the written law, undoubtedly gives colour to the notion that the extraordinary harshness of the Hindoo text-writer to widows is of sacerdotal origin. A custom, of which there are many traces in the ancient law of the Aryan races, but which is not by any means confined to them, gives under various conditions the government of the family, and, as a consequence of government, the control of its property, to the wife after the death of her husband, sometimes during the minority of her male children, sometimes for her own life upon failure of direct male descendants, sometimes even, in this last contingency, absolutely. But the same feeling, gradually increasing in strength, which led them in their priestly capacity to preach to the widow the duty of self-immolation at her husband's funeral-pyre, appears to have made her proprietary rights more and more distasteful to the Brahminical text-writers; and the Hindoo jurists of all schools,

though of some more than others, have striven hard to maintain the principle that the life of the widow is properly a life of self-denial and humiliation. Partly by calling in the distinction between separate and undivided property, and partly by help of the distinction between movable and immovable property, they have greatly cut down the widow's rights, not only reducing them for the most part (where they arise) to a life-interest, but abridging this interest by a variety of restrictions to little more than a trusteeship. Here again I am assured that any practice corresponding to this doctrine is very rarely found in the unwritten usage, under which not only does the widow tend to become a true proprietress for life, but approaches here and there to the condition of an absolute owner.

The preservation, during a number of centuries which it would be vain to calculate, of this great body of unwritten custom, differing locally in detail, but connected by common general features, is a phenomenon which the jurist must not pass over. Before I say anything of the conclusions at which it points, let me tell you what is known of the agencies by which it has been preserved. The question has by no means been fully investigated, but many of those best entitled to have an opinion upon it have informed me that one great instrumentality is the perpetual discussion of customary law by the people

themselves. We are, perhaps, too apt to forget that in all stages of social development men are comparatively intelligent beings, who must have some subjects of mental interest. The natives of India, for poor and ignorant men, have more than might be expected of intellectual quickness, and the necessities of the climate and the simplicity of their habits make the calls on their time less, and their leisure greater, than would be supposed by persons acquainted only with the labourers of colder climates. Those who know most of them assert that their religious belief is kept alive not by direct teaching, but by the constant recitation in the vernacular of parts of their sacred poems, and that the rest of their thought and conversation is given to their usages. But this, doubtless, is not the whole explanation. I have been asked —and I acknowledge the force of the question—how traditions of immemorial custom could be preserved by the agricultural labourers of England, even if they had more leisure than they have? But the answer is that the social constitution of India is of the extreme ancient, that of England of the extreme modern type. I am aware that the popular impression here is that Indian society is divided, so to speak, into a number of horizontal strata, each representing a caste. This is an entire mistake. It is extremely doubtful whether the Brahminical theory of caste upon caste was ever true except of the two

highest castes; and it is even likely that more importance has been attached to it in modern than ever was in ancient times. The real India contains one priestly caste, which in a certain, though a very limited, sense is the highest of all, and there are, besides, some princely houses and a certain number of tribes, village-communities, and guilds, which still in our day advance a claim, considered by many good authorities extremely doubtful, to belong to the second or third of the castes recognised by the Brahminical writers. But otherwise, caste is merely a name for trade or occupation, and the sole tangible effect of the Brahminical theory is that it creates a religious sanction for what is really a primitive and natural distribution of classes. The true view of India is that, as a whole, it is divided into a vast number of independent, self-acting, organised social groups—trading, manufacturing, cultivating. The English agricultural labourers of whom we spoke, are a too large, too indeterminate class, of which the units are too loosely connected, and have too few interests in common, to have any great power of retaining tradition. But the smaller organic groups of Indian society are very differently situated. They are constantly dwelling on traditions of a certain sort, they are so constituted that one man's interests and impressions correct those of another and some of them have in their council of elders a

permanent machinery for declaring traditional usage, and solving doubtful points. Tradition, I may observe, has been the subject of so much bitter polemical controversy that a whole group of most interesting and important questions connected with it have never been approached in the proper spirit. Under what conditions it is accurate, and in respect of what class of matters is accurate, are points with which the historical jurist is intimately concerned. I do not pretend to sum up the whole of the lessons which observation of Indian society teaches on the subject, but it is assuredly the belief of men who were at once conscientious observers and had no antecedent theory to sway them, that naturally organised groups of men are obstinate conservators of traditional law, but that the accuracy of the tradition diminishes as the group becomes larger and wider.

The knowledge that this great body of traditional law existed, and that its varieties were just sufficiently great for the traditions of one group to throw light on those of another, will hereafter deeply affect the British administration of India. But I shall have to point out to you that there are signs of its being somewhat abused. There has been a tendency to leave out of sight the distinctions which render different kinds of tradition of very different value; the distinction, for example, between a mere tradition

as to the rule to be followed in a given case and a tradition which has caused a rule to be followed; the distinction, as it has been put, between customs which do and customs which do not correspond to practices. If a tradition is not kept steady by corresponding practice, it may be warped by all sorts of extraneous influences. The great value now justly attached in India to traditional law has even brought about the absurdity of asking it to solve some of the most complicated problems of modern society, problems produced by the collapse of the very social system which is assumed to have in itself their secret.

I have been conducted by this discussion to a topic on which a few words may not be thrown away. Not only in connection with the preservation of customary law, but as a means of clearing the mind before addressing oneself to a considerable number of juridical questions, I must ask you to believe that the very small place filled by our own English law in our thoughts and conversation is a phenomenon absolutely confined to these islands. A very simple experiment, a very few questions asked after crossing the Channel, will convince you that Frenchmen, Swiss, and Germans of a very humble order have a fair practical knowledge of the law which regulates their everyday life. We in Great Britain and Ireland are altogether singular in our

tacit conviction that law belongs as much to the class of exclusively professional subjects as the practice of anatomy. Ours is, in fact, under limitations which it is not necessary now to specify, a body of traditional customary law; no law is better known by those who live under it in a certain stage of social progress, none is known so little by those who are in another stage. As social activity multiplies the questions requiring judicial solution, the method of solving them which a system of customary law is forced to follow is of such a nature as to add enormously to its bulk. Such a system in the end beats all but the experts ; and we, accordingly, have turned our laws over to experts, to attorneys and solicitors, to barristers above them, and to judges in the last resort. There is but one remedy for this—the reduction of the law to continuous writing and its inclusion within aptly-framed general propositions. The facilitation of this process is the practical end of scientific jurisprudence.

As in the Lectures which follow I shall not often appeal to what are ordinarily recognised as the fountains of Hindoo law, it was necessary for me to explain that the materials for the conclusions which I shall state—unwritten usages, probably older and purer than the Brahminical written law—are now having their authority acknowledged even by the Indian Courts, once the jealous conservators of the

integrity of the sacerdotal system. These materials are partly to be found in that large and miscellaneous official literature which I described as having grown out of the labours of the functionaries who adjust the share of the profits of cultivation claimed by the British Government as supreme landlord; but much which is essential to a clear understanding can only be at present collected from the oral conversation of experienced observers who have passed their maturity in administrative office. The inferences suggested by the written and oral testimony would perhaps have had interest for few except those who had passed, or intended to pass, a life in Indian office; but their unexpected and (if I may speak of the impression on myself) their most startling coincidence with the writers who have recently applied themselves to the study of early Teutonic agricultural customs, gives them a wholly new value and importance. It would seem that light is pouring from many quarters at once on some of the darkest passages in the history of law and of society. To those who knew how strong a presumption already existed that individual property came into existence after a slow process of change, by which it disengaged itself from collective holdings by families or larger assemblages, the evidence of a primitive village system in the Teutonic and Scandinavian countries had very great interest; this interest largely increased when

England, long supposed to have had since the Norman Conquest an exceptional system of property in land, was shown to exhibit almost as many traces of joint-ownership and common cultivation as the countries of the North of the Continent; but our interest culminates, I think, when we find that these primitive European tenures and this primitive European tillage constitute the actual working system of the Indian-village communities, and that they determine the whole course of Anglo-Indian administration.

LECTURE III.

THE WESTERN VILLAGE-COMMUNITY.

CONTENTS.

Antiquity of Indian Customary Law—Traditional Law—Analysis of a Law—Indian Conceptions of Law—English Influence on Legal Conceptions—Unwilling Assumption of Sovereignty—Influence of Courts of Justice—Change in Nature of Usage—Growth of Conception of Right—Influence of English Law—Connection of Eastern and Western Custom—Von Maurer—The Teutonic Village-Community—The Arable Mark—English Theories of Land-Law—The Arable Mark in England—Shifting Severalties—The Common Fields—Their Great Extent—Extract from Marshall—Scott on Udal Tenures—Commonty of Lauder—Peculiarities of Scottish Example—Vestiges of the Mark.

LECTURE III.

THE WESTERN VILLAGE-COMMUNITY.

I HAVE AFFIRMED the fact to be established as well as any fact of the kind can be, that there exist in India several—and it may even be said, many—considerable bodies of customary law, sufficiently alike to raise a strong presumption that they either had a common origin or sprang from a common social necessity, but sufficiently unlike to show that each of them must have followed its own course of development. There exists a series of writings which pretend to be a statement of these customs, but this series proves to include a part only of the whole body of usage; it probably embodied from the first only one set of customary rules, and its form shows clearly that it must have had a separate and very distinct history of its own. Few assertions respecting lapse of time and the past can safely be made of anything Indian; but there can be no reasonable doubt that all this customary law is of very great antiquity. I need scarcely point out to you that such facts as these have a

bearing on more than one historical problem. If, for example, I am asked whether it is possible that, when the Roman Empire had been overrun by the Northern races, the Roman law could be preserved by mere oral transmission in countries in which no breviaries of that law were published by the invading chiefs to keep it alive, I can only say that observation of India shows such preservation to be abstractedly possible; and shows it moreover to be possible in the face of written records of a legal or legislative character which contain no reference to the unwritten and orally transmitted rules. But I should at the same time have to point out that nothing in India tends to prove that law may be orally handed down from one generation to another of men who form an indeterminate class, or that it can be preserved by any agency than that of organised, self-acting, social groups. I should further have to observe that, unless there have been habits and practices corresponding to the traditional rules, those rules may be suspected of having undergone considerable modification or depravation.

I pass, however, to matters which have a closer interest for the jurist, and which are, therefore, discussed with more propriety in this department of study. So long as that remarkable analysis of legal conceptions effected by Bentham and Austin is not very widely known in this country (and I see no signs

of its being known on the Continent at all), it is perhaps premature to complain of certain errors, into which it is apt to lead us on points of historical jurisprudence. If, then, I employ the Indian legal phenomena to illustrate these errors, I must preface what I have to say with the broad assertion that nobody who has not mastered the elementary part of that analysis can hope to have clear ideas either of law or of jurisprudence. Some of you may be in a position to call to mind the mode in which these English jurists decompose the conception of a law, and the nature and order of the derivative conceptions which they assert to be associated with the general conception. A law, they say, is a command of a particular kind. It is addressed by political superiors or sovereigns to political inferiors or subjects; it imposes on those subjects an obligation or *duty* and threatens a penalty (or *sanction*) in the event of disobedience. The power vested in particular members of the community of drawing down the sanction on neglects or breaches of the duty is called a Right. Now, without the most violent forcing of language, it is impossible to apply these terms, *command*, *sovereign*, *obligation*, *sanction*, *right*, to the customary law under which the Indian village-communities have lived for centuries, practically knowing no other law civilly obligatory. It would be altogether inappropriate to speak of a political superior commanding a particular course of action

to the villagers. The council of village elders does not command anything, it merely declares what has always been. Nor does it generally declare that which it believes some higher power to have commanded; those most entitled to speak on the subject deny that the natives of India necessarily require divine or political authority as the basis of their usages; their antiquity is by itself assumed to be a sufficient reason for obeying them. Nor, in the sense of the analytical jurists, is there *right* or *duty* in an Indian village-community; a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society. More than all, customary law is not enforced by a sanction. In the almost inconceivable case of disobedience to the award of the village council, the sole punishment, or the sole certain punishment, would appear to be universal disapprobation. And hence, under the system of Bentham and Austin, the customary law of India would have to be called morality—an inversion of language which scarcely requires to be formally protested against.

I shall have hereafter to tell you that in certain of the Indian communities there are signs of one family enjoying an hereditary pre-eminence over the others, so that its head approaches in some degree to the position of chief of a clan, and I shall have to explain that this inherited authority is sometimes partially

and sometimes exclusively judicial, so that the chief becomes a sort of hereditary judge. Of communities thus circumstanced the juristical analysis to which I have been referring is more nearly true. So too the codified Brahminical law could be much more easily resolved into the legal conceptions determined by Bentham and Austin. It assumes that there is a king to enforce the rules which it sets forth, and provides a procedure for him and his subordinates, and penalties for them to inflict; and moreover it becomes true law in the juristical sense, through another peculiarity which distinguishes it. Every offence against this written law is also a sin; to injure a man's property is for instance to diminish the power of his sons to provide properly for expiatory funeral rites, and such an injury is naturally supposed to entail divine punishment on its perpetrator.

We may, however, confine our attention to the unwritten usages declared from time to time by the council of village elders. The fact which has greatest interest for the jurist is one which has been established by the British dominion of India, and which could not probably have been established without it. It may be described in this way. Whenever you introduce any one of the legal conceptions determined by the analysis of Bentham and Austin, you introduce all the others by a process which is apparently inevitable. No better proof

could be given that, though it be improper to employ these terms *sovereign*, *subject*, *command*, *obligation*, *right*, *sanction*, of law in certain stages of human thought, they nevertheless correspond to a stage to which law is steadily tending and which it is sure ultimately to reach.

Nothing is more certain than that the revolution of legal ideas which the English have effected in India was not effected by them intentionally. The relation of sovereign to subject, for instance, which is essential to the modern juridical conception of law, was not only not established by them, but was for long sedulously evaded. When they first committed themselves to a course of territorial aggrandisement, they adopted a number of curious fictions rather than admit that they stood to the people of India as political superior to political inferior. Nor had they the slightest design of altering the customary law of the country. They have been accused of interfering with native usages, but when the interference (which has been on the whole very small) has taken place, it has either arisen from ignorance of the existence of custom or has been forced on them, in very recent times and in the shape of express legislation, by necessities which I may be led hereafter to explain.[1] The English never therefore intended that

[1] I have endeavoured to redeem this promise in part by printing in an Appendix a Minute recorded in India on the subject of the over-legislation not infrequently attributed to the British Government.

the laws of the country should rest on their commands, or that these laws should shift in any way their ancient basis of immemorial usage. One change only they made, without much idea of its importance, and thinking it probably the very minimum of concession to the exigencies of civilised government. They established Courts of Justice in every administrative district. Here I may observe that, though the Brahminical written law assumes the existence of king and judge, yet at the present moment in some of the best governed semi-independent native States there are no institutions corresponding to our Courts of Justice. Disputes of a civil nature are adjusted by the elders of each village-community, or occasionally, when they relate to land, by the functionaries charged with the collection of the prince's revenue. Such criminal jurisdiction as is found consists in the interposition of the military power to punish breaches of the peace of more than ordinary gravity. What must be called criminal law is administered through the arm of the soldier.

In a former Lecture I spoke of the stiffness given to native custom through the influence of English law and English lawyers on the highest courts of appeal. The changes which I am about to describe arose from the mere establishment of local courts of lowest jurisdiction ; and while they have effected a revolution, it is a revolution which in the first

instance was conservative of the rigidity of native usage. The customs at once altered their character. They are generally collected from the testimony of the village elders ; but when these elders are once called upon to give their evidence, they necessarily lose their old position. They are no longer a half-judicial, half-legislative council. That which they have affirmed to be the custom is henceforward to be sought from the decisions of the Courts of Justice, or from official documents which those courts receive as evidence; such, for example, as the document which, under the name of the Record of Rights, I described to you as a detailed statement of all rights in land drawn up periodically by the functionaries employed in settling the claim of the Government to its share of the rental. Usage, once recorded upon evidence given, immediately becomes written and fixed law. Nor is it any longer obeyed as usage. It is henceforth obeyed as the law administered by a British Court, and has thus really become a command of the sovereign. The next thing is that the vague sanctions of customary law disappear. The local courts have of course power to order and guide the execution of their decrees, and thus we have at once the sanction or penalty following disobedience of the command. And, with the command and with the sanction, come the conceptions of legal right and duty. I am not speaking of the logical but of the practical

consequence. If I had to state what for the moment is the greatest change which has come over the people of India and the change which has added most seriously to the difficulty of governing them, I should say it was the growth on all sides of the sense of individual legal right; of a right not vested in the total group but in the particular member of it aggrieved, who has become conscious that he may call in the arm of the State to force his neighbours to obey the ascertained rule. The spread of this sense of individual right would be an unqualified advantage if it drew with it a corresponding improvement in moral judgment. There would be little evil in the British Government giving to native custom a constraining force which it never had in purely native society, if popular opinion could be brought to approve of the gradual amelioration of that custom. Unfortunately for us, we have created the sense of legal right before we have created a proportionate power of distinguishing good from evil in the law upon which the legal right depends.

You will see then that the English government of India consciously introduced into India only one of the conceptions discriminated by the juridical analysis of a law. This was the sanction or penalty; in establishing Courts of Justice they of course contemplated the compulsory execution of decrees. But in introducing one of the terms of the series you will

observe they introduced all the others—the political superior, the command, the legal right and the legal duty. I have stated that the process is in itself one conservative of native usage, and that the spirit introduced from above into the administration of the law by English lawyers was also one which tended to stereotype custom. You may therefore perhaps recall with some surprise the reason which I assigned in my first Lecture for making haste to read the lessons which India furnishes to the juridical student. Indian usage, with other things Indian, was, I told you, passing away. The explanation is that you have to allow for an influence, which I have merely referred to as yet, in connection with the exceptional English Courts at Calcutta, Madras, and Bombay. Over the interior of India it has only begun to make itself felt of late years, but its force is not yet nearly spent. This is the influence of English law; not, I mean, of the spirit which animates English lawyers and which is eminently conservative, but the contagion, so to speak, of the English system of law,—the effect which the body of rules constituting it produces by contact with native usage. Primitive customary law has a double peculiarity: it is extremely scanty in some departments, it is extremely prodigal of rules in others; but the departments in which rules are plentiful are exactly those which lose their importance as the movements of society become

quicker and more various. The body of persons to whose memory the customs are committed has probably always been a quasi-legislative as well as a quasi-judicial body, and has always added to the stock of usage by tacitly inventing new rules to apply to cases which are really new. When, however, the customary law has once been reduced to writing and recorded by the process which I have described, it does not supply express rules or principles in nearly sufficient number to settle the disputes occasioned by the increased activity of life and the multiplied wants which result from the peace and plenty due to British rule. The consequence is wholesale and indiscriminate borrowing from the English law—the most copious system of express rules known to the world. The Judge reads English law-books; the young native lawyers read them, for law is the study into which the educated youth of the country are throwing themselves, and for which they may even be said to display something very like genius. You may ask what authority have these borrowed rules in India. Technically, they have none whatever; yet, though they are taken (and not always correctly taken) from a law of entirely foreign origin, they are adopted as if they naturally commended themselves to the reason of mankind; and all that can be said of the process is that it is another example of the influence, often felt in European legal history, which

express written law invariably exercises on unwritten customary law when they are found side by side. For myself, I cannot say that I regard this transmutation of law as otherwise than lamentable. It is not a correction of native usage where it is unwholesome. It allows that usage to stand, and confirms it rather than otherwise; but it fills up its interstices with unamalgamated masses of foreign law. And in a very few years it will destroy its interest for the historical jurist, by rendering it impossible to determine what parts of the structure are of native and what of foreign origin. Nor will the remedial process which it is absolutely necessary to apply for the credit of the British name restore the integrity of the native system. For the cure can only consist in the enactment of uniform, simple, codified law, formed for the most part upon the best European models.

It is most desirable that one great branch of native Indian usage should be thoroughly examined before it decays, inasmuch as it is through it that we are able to connect Indian customary law with what appears to have once been the customary law of the Western World. I speak of the Indian customs of agricultural tenure and of collective property in land.

For many years past there has been sufficient evidence to warrant the assertion that the oldest discoverable forms of property in land were forms of collective property, and to justify the conjecture that

separate property had grown through a series (though not always an identical series) of changes, out of collective property or ownership in common. But the testimony which was furnished by the Western World had one peculiarity. The forms of collective property which had survived and were open to actual observation were believed to be found exclusively in countries peopled by the Sclavonic race. It is true that historical scholars who had made a special study of the evidence concerning ancient Teutonic holdings, as, for example, the early English holdings, might have been able to assert of them that they pointed to the same conclusions as the Sclavonic forms of village property; but the existing law of property in land, its actual distribution and the modes of enjoying it, were supposed to have been exclusively determined in Teutonic countries by their later history. It was not until Von Maurer published a series of works, in which his conclusions were very gradually developed, that the close correspondence between the early history of Teutonic property and the facts of proprietary enjoyment in the Germany of our own day was fully established; and not two years have elapsed since Nasse called attention to the plain and abundant vestiges of collective Teutonic property which are to be traced in England.

I shall not attempt to do more than give you such a summary of Von Maurer's conclusions as may suffice

to connect them with the results of official observation and administrative enquiry in India. You will find a somewhat fuller compendium of them in the paper contributed by Mr. Morier to the volume recently published, called 'Systems of Land Tenure in Various Countries.' Mr. Morier is the English Chargé d'Affaires at Darmstadt, and he assures me that his account of the abundant vestiges of collective property which are to be found in the more backward parts of Germany may easily be verified by the eye. They are extremely plain in some territorial maps with which he has been good enough to supply me.

The ancient Teutonic cultivating community, as it existed in Germany itself, appears to have been thus organised. It consisted of a number of families standing in a proprietary relation to a district divided into three parts. These three portions were the Mark of the Township or Village, the Common Mark or waste, and the Arable Mark or cultivated area. The community inhabited the village, held the common mark in mixed ownership, and cultivated the arable mark in lots appropriated to the several families.

Each family in the township was governed by its own free head or paterfamilias. The precinct of the family dwelling house could be entered by nobody but himself and those under his *patria potestas*, not even by officers of the law, for he himself made law within and enforced law made without.

But, while he stood under no relations controllable by others to the members of his family, he stood in a number of very intricate relations to the other heads of families. The sphere of usage or customary law was not the family, but the connection of one family with another and with the aggregate community.

Confining ourselves to proprietary relations, we find that his rights or (what is the same thing) the rights of his family over the Common Mark are controlled or modified by the rights of every other family. It is a strict ownership in common, both in theory and in practice. When cattle grazed on the common pasture, or when the householder felled wood in the common forest, an elected or hereditary officer watched to see that the common domain was equitably enjoyed.

But the proprietary relation of the householder which has most interest for us is his relation to the Arable Mark. It seems always in theory to have been originally cut out of the common mark, which indeed can only be described as the portion of the village domain not appropriated to cultivation. In this universally recognised original severance of the arable mark from the common mark we come very close upon the beginning of separate or individual property. The cultivated land of the Teutonic village-community appears almost invariably to have been divided into three great fields. A rude rotation of crops was the

object of this threefold division, and it was intended that each field should lie fallow once in three years.

The fields under tillage were not however cultivated by labour in common. Each householder has his own family lot in each of the three fields, and this he tills by his own labour, and that of his sons and his slaves. But he cannot cultivate as he pleases. He must sow the same crop as the rest of the community, and allow his lot in the uncultivated field to lie fallow with the others. Nothing he does must interfere with the right of other households to have pasture for sheep and oxen in the fallow and among the stubbles of the fields under tillage. The rules regulating the modes of cultivating the various lots seem to have been extremely careful and complicated, and thus we may say without much rashness that the earliest law of landed property arose at the same time when the first traces of individual property began to show themselves, and took the form of usages intended to produce strict uniformity of cultivation in all the lots of ground for the first time appropriated. That these rules should be intricate is only what might be expected. The simplicity of the earliest family law is not produced by any original tendency of mankind, but is merely the simplicity which goes always with pure despotism. Ancient systems of law are in one sense scanty. The number of subjects with which they deal is

small, and, from the modern jurist's point of view, there are great gaps in them. But the number of minute rules which they accumulate between narrow limits is very surprising. The most astonishing example of this is to be found in the translation of the Ancient Irish law now in course of publication by the Irish Government. The skeleton of this law is meagre enough, but the quantity of detail is vast—so vast that I cannot but believe that much of it is attributable to the perverted ingenuity of a class of hereditary lawyers.

The evidence appears to me to establish that the Arable Mark of the Teutonic village-community was occasionally shifted from one part of the general village domain to another. It seems also to show that the original distribution of the arable area was always into exactly equal portions, corresponding to the number of free families in the township. Nor can it be seriously doubted upon the evidence that the proprietary equality of the families composing the group was at first still further secured by a periodical redistribution of the several assignments. The point is one of some importance. One stage in the transition from collective to individual property was reached when the part of the domain under cultivation was allotted among the Teutonic races to the several families of the township; another was gained when the system of 'shifting severalties' came

to an end, and each family was confirmed for a perpetuity in the enjoyment of its several lots of land. But there appears to be no country inhabited by an Aryan race in which traces do not remain of the ancient periodical redistribution. It has continued to our own day in the Russian villages. Among the Hindoo villagers there are widely extending traditions of the practice; and it was doubtless the source of certain usages, to be hereafter described, which have survived to our day in England and Germany.

I quote from Mr. Morier's paper the following observations. 'These two distinct aspects of the early Teutonic freeman as a "lord" and a "commoner" united in the same person—one when within the pale of his homestead, the other when standing outside that pale in the economy of the mark—should not be lost sight of. In them are reflected the two salient characteristics of the Teutonic race, the spirit of individuality, and its spirit of association; and as the action and reaction of these two laws have determined the social and political history of the race, so they have in an especial manner affected and determined its agricultural history.'

Those of you who are familiar with the works of Palgrave, Kemble, and Freeman, are aware that the most learned writers on the early English proprietary system give an account of it not at variance in any

material point with the description of the Teutonic mark which I have repeated from Von Maurer. The question, then, which at once presses on us is whether an ancient form of property, which has left on Germany traces so deep and durable that (again to quote Mr. Morier) they may always be followed on ordinary territorial maps, must be believed to have quite died out in England, leaving no sign of itself behind? Unquestionably the answer furnished by the received text-books of English real-property law is affirmative. They either assume, or irresistibly suggest, that the modern law is separated from the ancient law by some great interruption; and Nasse, the object of whose work is to establish the survival of the Mark in England, allows that German enquirers had been generally under the impression that the history of landed property in this country was characterised by an exceptional discontinuity. There is much in the technical theory of our real-property law which explains these opinions; and it is less wonderful that lawyers should have been led to them by study of the books, than that no doubt of their soundness should have been created by facts with which practitioners were occasionally well acquainted. These facts, establishing the long continuance of joint cultivation by groups modelled on the community of the Mark, were strongly pressed upon the Select Committee of the House of Commons

which sat to consider the subject of inclosures in 1844 by a witness, Mr. Blamire, who was at once a lawyer and an official unusually familiar with English landed property in its less usual shapes. Yet Mr. Blamire appears (' Evidence before Select Committee of 1844,' p. 32, q. 335) to have unreservedly adopted the popular theory on the subject, which I believe to be that at some period—sometimes vaguely associated with the feudalisation of Europe, sometimes more precisely with the Norman Conquest—the entire soil of England was confiscated ; that the whole of each manor became the lord's demesne ; that the lord divided certain parts of it among his free retainers, but kept a part in his own hands to be tilled by his villeins ; that all which was not required for this distribution was left as the lord's waste ; and that all customs which cannot be traced to feudal principles grew up insensibly, through the subsequent tolerance of the feudal chief.

There has been growing attention for some years past to a part of the observable phenomena which prove the unsoundness of the popular impression. Many have seen that the history of agriculture, of land-law, and of the relations of classes cannot be thoroughly constructed until the process has been thoroughly deciphered by which the common or waste-land was brought under cultivation either by the lord of the manor or by the lord of the manor

in connection with the commoners. The history of Inclosures and of Inclosure Acts is now recognised as of great importance to our general history. But corresponding study has not, or not of late, been bestowed on another set of traces left by the past. The Arable Mark has survived among us as well as the Common Mark or waste, and it the more deserves our attention in this place because its interest is not social or political but purely juridical.

The lands which represent the cultivated portion of the domain of the ancient Teutonic village-communities are found more or less in all parts of England, but more abundantly in some counties than in others. They are known by various names. When the soil is arable, they are most usually called 'common,' 'commonable,' or 'open' fields, or sometimes simply 'intermixed' lands. When the lands are in grass, they are sometimes known as 'lot meadows,' sometimes as 'lammas lands,' though the last expression is occasionally used of arable soil. The 'common fields' are almost invariably divided into three long strips, separated by green baulks of turf. The several properties consist in subdivisions of these strips, sometimes exceedingly minute; and there is a great deal of evidence that one several share in each of the strips belonged originally to the same ownership, and that all the several shares in any one strip were originally equal or nearly equal, though in progress of time a

good many have been accumulated in the same hands. The agricultural customs which prevail in these common fields are singularly alike. Each strip bears two crops of a different kind in turn and then lies fallow. The better opinion seems to be that the custom as to the succession of crops would not be sustained at law; but the right to feed sheep or cattle on the whole of one strip during the fallow year, or among the stubbles of the other two strips after the crops have been got in, or on the green baulks which divide the three fields, is generally treated as capable of being legally maintained. This right has in some cases passed to the lord of the manor, but sometimes it is vested in the body of persons who are owners of the several shares in the common fields. The grass lands bear even more distinct traces of primitive usage. The several shares in the arable fields, sometimes, but very rarely, shift from one owner to another in each successive year; but this is frequently the rule with the meadows, which, when they are themselves in a state of severalty, are often distributed once a year by casting lots among the persons entitled to appropriate and enclose them, or else change from one possessor to another in the order of the names of persons or tenements on a roll. As a rule the inclosures are removed after the hay-harvest and there are manors in which they are taken down by the villagers on Lammas Day (that is, Old

Lammas Day) in a sort of legalised tumultuary assembly. The group of persons entitled to use the meadows after they have been thrown open is often larger than the number of persons entitled to enclose them. All the householders in a parish, and not merely the landowners, are found enjoying this right. The same peculiarity occasionally, but much more rarely, characterises the rights over common arable fields; and it is a point of some interest, since an epoch in the history of primitive groups occurs when they cease to become capable of absorbing strangers. The English cultivating communities may be supposed to have admitted new-comers to a limited enjoyment of the meadows, up to a later date than the period at which the arable land had become the exclusive property of the older families of the group.

The statute 24 Geo. II. c. 23, which altered the English Calendar, recites (s. 5) the frequency of these ancient customs and forms of property, and provides that the periods for commencing common enjoyment shall be reckoned by the old account of time. They have been frequently noticed by agricultural writers, who have strongly and unanimously condemned them. There is but one voice as to the barbarousness of the agriculture perpetuated in the common arable fields, and as to the quarrels and heart-burning of which the 'shifting severalties' in the meadow land have been the source But both

common fields and common meadows are still plentiful on all sides of us. Speaking for myself personally, I have been greatly surprised at the number of instances of abnormal proprietary rights, necessarily implying the former existence of collective ownership and joint cultivation, which comparatively brief enquiry has brought to my notice; nor can I doubt that a hundred and fifty years ago instances of such rights could have been produced in vastly greater numbers, since Private Acts of Parliament for the inclosure of commonable fields were constantly passed in the latter part of the last and the earlier part of the present century, and since 1836 they have been extensively enclosed, agglomerated, and exchanged under the Common Fields Inclosure Act passed in that year, and under the general powers more recently vested in the Inclosure Commissioners. The breadth of land which was comparatively recently in an open, waste, or commonable condition, and which therefore bore the traces of the ancient Teutonic cultivating system, may be gathered from a passage in which Nasse sums up the statements made in a number of works by a writer, Marshall, whom I shall presently quote. 'In almost all parts of the country, in the Midland and Eastern Counties particularly, but also in the West—in Wiltshire for example—in the South, as in Surrey, in the North, as in Yorkshire, there are extensive open and common

fields. Out of 316 parishes in Northamptonshire, 89 are in this condition; more than 100 in Oxfordshire; about 50,000 acres in Warwickshire; in Berkshire, half the county; more than half of Wiltshire; in Huntingdonshire, out of a total area of 240,000 acres, 130,000 were commonable meadows, commons, and common fields.' (Ueber die Mittelalterliche Feldgemeinschaft in England,' p. 4.) The extent of some of the fields may be inferred from the fact, stated to me on good authority, that the pasturage on the dividing baulks of turf, which were not more than three yards wide, was estimated in one case at eighty acres. These footprints of the past were quite recently found close to the capital and to the seats of both Universities. In Cambridgeshire they doubtless corresponded to the isolated patches of dry soil which were scattered through the fens, and in the metropolitan county of Surrey, of which the sandy and barren soil produced much the same isolation of tillage as did the morasses of the fen country, they occurred so close to London as to impede the extension of its suburbs, through the inconvenient customs which they placed in the way of building. One of the largest of the common fields was found in the immediate neighbourhood of Oxford; and the grassy baulks which anciently separated the three fields are still conspicuous from the branch of the Great Northern Railway which leads to Cambridge.

The extract from Marshall's 'Elementary and Practical Treatise on Landed Property' (London, 1804) which I am about to read to you, is in some ways very remarkable. Mr. William Marshall was a writer on agriculture who published largely between 1770 and 1820, and he has left an account of the state of cultivation in almost every English county. He had been engaged for many years in 'studying the improvement and directing the management of several large estates in England, Wales and Scotland,' and he had taken a keen interest in what he terms 'provincial practices.' The picture of the ancient state of England which follows, was formed in his mind from simple observation of the phenomena of custom, tillage, and territorial arrangement which he saw before his eyes. You will perceive that he had not the true key in his possession, and that he figured to himself the collective form of property as a sort of common farm, cultivated by the tenantry of a single landlord.

'In this place it is sufficient to premise that a very few centuries ago, nearly the whole of the lands of England lay in an open, and more or less in a commonable state. Each parish or township (at least in the more central and northern districts), comprised different descriptions of lands; having been subjected, during successive ages, to specified modes of occupancy, under ancient and strict regulations,

which time had converted to law. These parochial arrangements, however, varied somewhat in different districts; but in the more central and greater part of the kingdom, not widely; and the following statement may serve to convey a general idea of the whole of what may be termed Common-field Townships, throughout England.

'Under this ingenious mode of organisation, each parish or township was considered as one common farm; though the tenantry were numerous.

'Round the village, in which the tenants resided, lay a few small inclosures, or grass yards; for rearing calves, and as baiting and nursery grounds for other farm stock. This was the common farmstead, or homestall, which was generally placed as near the centre of the more culturable lands of the parish or township as water and shelter would permit.

'Round the homestall, lay a suit of arable fields; including the deepest and soundest of the lower grounds, situated out of water's way; for raising corn and pulse; as well as to produce fodder and litter for cattle and horses in the winter season.

'And, in the lowest situation, as in the water-formed base of a rivered valley, or in swampy dips, shooting up among the arable lands, lay an extent of meadow grounds, or "ings"; to afford a supply of hay, for cows and working stock, in the winter and spring months.

'On the outskirts of the arable lands, where the soil is adapted to the pasturage of cattle, or on the springy slope of hills, less adapted to cultivation, or in the fenny bases of valleys, which were too wet, or gravelly water formed lands which were too dry, to produce an annual supply of hay with sufficient certainty, one or more stinted pastures, or hams, were laid out for milking cows, working cattle, or other stock which required superior pasturage in summer.

'While the bleakest, worst-soiled, and most distant lands of the township, were left in their native wild state; for timber and fuel; and for a common pasture, or suit of pastures; for the more ordinary stock of the township; whether horses, rearing cattle, sheep or swine; without any other stint, or restriction, than what the arable and meadow lands indirectly gave; every joint-tenant, or occupier of the township, having the nominal privilege of keeping as much live-stock on these common pastures, in summer, as the appropriated lands he occupied would maintain, in winter.

'The appropriated lands of each township were laid out with equal good sense and propriety. That each occupier might have his proportionate share of lands of different qualities, and lying in different situations, the arable lands, more particularly, were divided into numerous parcels, of sizes, doubtless, according to the size of the given township, and the number and rank of the occupiers.

'And, that the whole might be subjected to the same plan of management, and be conducted as one common farm, the arable lands were moreover divided into compartments, or "fields," of nearly equal size, and generally three in number, to receive, in constant rotation, the triennial succession of fallow, wheat (or rye) and spring crops (as barley, oats, beans, and peas): thus adopting and promoting a system of husbandry, which, howsoever improper it is become, in these more enlightened days, was well adapted to the state of ignorance, and vassalage, of feudal times; when each parish or township had its sole proprietor; the occupiers being at once his tenants and his soldiers, or meaner vassals. The lands were in course liable to be more or less deserted by their occupiers, and left to the feebleness of the young, the aged, and the weaker sex. But the whole township being, in this manner, thrown into one system, the care and management of the live-stock, at least, would be easier and better than they would have been, under any other arrangement. And, at all times, the manager of the estate was better enabled to detect bad husbandry, and enforce that which was more profitable to the tenants and the estate, by having the whole spread under the eye, at once, than he would have been, had the lands been distributed in detached inclosed farmlets; besides avoiding the expense of inclosure. And another advantage arose from this

more social arrangement, in barbarous times: the tenants, by being concentrated in villages, were not only best situated to defend each other from predatory attacks; but were called out, by their lord, with greater readiness, in cases of emergency.' (Marshall, pp. 111–113.)

The readers of the 'Pirate' are, I dare say, aware that Sir Walter Scott had his attention strongly attracted to the so-called Udal tenures of Orkney and Shetland. The fact has more juridical interest than it once had, now that recent writers have succeeded in completely identifying the ancient Scandinavian and ancient German proprietary usages. In the diary which he wrote of his voyage with the Commissioners of Lighthouses round the coasts of Scotland, Scott observes: 'I cannot get a distinct account of the nature of the land-rights. The Udal proprietors have ceased to exist, yet proper feudal tenures seem ill understood. Districts of ground are in many instances understood to belong to townships or communities, possessing what may be arable by patches and what is moor as a commonty *pro indiviso*. But then individuals of such a township often take it upon them to grant feus of particular parts of the property thus possessed *pro indiviso*. The town of Lerwick is built upon a part of the commonty of Sound; the proprietors of the houses having feu-rights from different heritors of that township, but why

from one rather than other . . . . seems altogether uncertain' (Lockhart's 'Life of Scott,' iii. p. 145). That these tenures survived till lately in the northern islands has been long known, but there has been a general impression that the strict and consistent feudalism of Scotland had effaced the traces of older Teutonic usage in the Lowlands. Yet a return recently presented to Parliament suggests that a re-examination of Scottish agricultural customs might be usefully undertaken. 'There are,' it is stated, 'within the bounds of the royalty of the burgh of Lauder 105 separate portions of land called Burgess Acres. These vary in extent from one and a half acre to three and a half acres. To each such acre there is a separate progress of writs, and these "Acres" are the private and absolute property of individuals. . . . No one has hitherto been admitted a burgess of the burgh who has not been an owner of one of these Burgess Acres. The lands of the burgh consist of . . . . Lauder Common, extending to about 1,700 acres, which has, from all time of which there is any record, been possessed thus. A portion of it has been set off periodically, say once in five or seven years, to be broken up and ploughed during that time, and at the end of that time fixed has been laid down in grass, and grazed along with the other lands: when another portion of the common was, in the same way, broken up and ploughed, and again laid down in

grass. The portion of the common so broken up and ploughed at a time has, of recent years, been about 130 acres in extent. An allotment of this portion of the common has been given to the owner of each of the 105 burgess acres, whether he happened to be a burgess or not, one allotment for each acre. The portion laid off for cultivation is, in the first place, cut into the number of allotments required, and the share of each person is decided by lot. The conditions attached to the taking of hill parts have been, compliance with a system of cultivation prescribed by the town council, and payment of a small assessment, generally just sufficient to reimburse the burgh for expenses laid out in making roads, drains, &c., to enhance the value of the land for cultivation. These allotments have been called "Hill parts," and the average worth of each is 1*l.* per annum. The whole of the remainder of the common has been used for grazing purposes, and has been occurred as follows: Each burgess resident within the bounds of the burgh has grazed on the common two cows, or an equivalent, and a certain number of sheep—at present, and for some years, fifteen; and each widow of a burgess, resident in the burgh, has grazed on the common one cow, or an equivalent, and a certain number of sheep—at present, and for many years, twelve' ('Return of Boroughs or Cities in the United Kingdom, possessing Common Land,' Appendix I., House of Commons, August 10, 1870).

It may be doubted whether a more perfect example of the primitive cultivating community is extant in England or Germany. As compared with the English instances, its form is extremely archaic. The arable mark, cultivated under rules prescribed by the town council, shifts periodically from one part of the domain to another, and the assignment of parcels within the cultivated area is by lot. It is interesting too to observe that the right to land for purposes of tillage is inseparably connected with the ownership of certain plots of land within the township. A similar connection between the shares in the common field and certain ancient tenements in a village is sometimes found in England and has been formally established at law. (See the bitter complaints of Marshall, 'Rural Economy of Yorkshire,' i. 55.) On the other hand, a group of persons more loosely defined has the right to pasture on the part of the common in grass, and this peculiarity occurs also in England. I am informed that most of the Scottish burghs have recently sold their 'commonties;' but it is to be hoped that all traces of the ancient customs of enjoyment have not been quite obliterated.

Upon the evidence collected by Nasse, supplied by the works of Marshall, and furnished by the witnesses examined before the Select Committee of 1844, and upon such as I have myself been able to gather, the vestiges of the Teutonic village-community which

remained before the inclosures of the last century and the present may be thus compendiously described: The arable part of the domain was indicated (1) by simple intermixed fields, *i.e.* fields of nearly equal size mingled together and belonging to an extraordinary number of owners, so that, according to Mr. Blamire's statement, in one parish containing 2,831 acres there were (in 1844) 2,315 pieces of open land which included 2,327 acres, giving an average size of one acre (Evidence, Select Committee, p. 17, q. 185); (2) by fields of nearly equal size arranged in three long strips and subject to various customs of tillage, the most universal being the fallow observed by each of the strips in successive years; (3) by 'shifting severalties' of arable land, which were not, however, of frequent occurrence; (4) by the existence of certain rights of pasture over the green baulks which prevented their removal.

The portion of the domain kept in grass was represented: (1) by 'shifting severalties' of meadow land, which were very frequent, the modes of successive allotment being also very various; (2) by the removal of inclosures after hay-harvest; (3) by the exercise, on the part of a community generally larger than the number of persons entitled to enclose, of a right to pasture sheep and cattle on the meadow-land during the period when the hay was not maturing for harvest.

The rights known to exist over Commons constitute much too large a subject to be treated of here. But two relics of the ancient collective cultivation may be specially mentioned. The supervision of the communal officer who watched over the equitable enjoyment of the pastures has become the custom of 'stint of common,' by which the number of the beasts which the commoner might turn out on the waste is limited and regulated. There is also a good deal of evidence that some commons, now entirely waste, bear the traces of ancient tillage. The most probable explanation is that in these cases the whole of the arable mark had been removed from one part of the domain to another, and that the traces of cultivation show the place of common fields anciently deserted.

LECTURE IV.

THE EASTERN VILLAGE-COMMUNITY

CONTENTS.

The Indian Village-Community—Mahometan Theory of Ownership—Land Settlement of Bengal—The Indian Proprietary Unit—The Indian Village—The Cultivated Land—The Growth of Custom—Water Rules—The Sources of Primitive Law—Customs of Re-partition—The Village—Secrecy of Family Life—Dislike of English Criminal Law—Fictions Attending Legislation—Village Rules—Origin of Indian Towns—Indian Capitals—The Village Waste—The Indian Wastes—The Government and the Wastes—The Village Council—Peaceful Character of Population—Hereditary Trades—Remuneration of Village Traders—The Outsiders—Absorption of Strangers by Community.

LECTURE IV.

THE EASTERN VILLAGE-COMMUNITY.

I PROPOSE in this Lecture to describe summarily and remark upon the Indian forms of property and tenure corresponding to the ancient modes of holding and cultivating land in Europe which I discussed at some length last week. It does not appear to me a hazardous proposition that the Indian and the ancient European systems of enjoyment and tillage by men grouped in village-communities are in all essential particulars identical. There are differences of detail between them, and I think you will find the discussion of these differences and of their apparent causes not uninteresting nor barren of instruction to the student of jurisprudence.

No Indian phenomenon has been more carefully examined, and by men more thoroughly in earnest, than the Village-Community. For many years past the discovery and recognition of its existence have ranked among the greatest achievements of Anglo-Indian administration. But the Village-Community did not emerge into clear light very early in the

history of our conquest and government. Although this peculiar group is referred to in Manu, the English found little to guide them to its great importance in the Brahminical codified law of the Hindoos which they first examined. Perhaps in the large space assigned in that law to joint-property and partitions they might have found a hint of the truth, if the great province in which they were first called upon to practise administration on a large scale, Lower Bengal or Bengal Proper, had not happened to be the exact part of India in which, from causes not yet fully determined, the village system had fallen into great decay. The assumption which the English first made was one which they inherited from their Mahometan predecessors. It was, that all the soil belonged in absolute property to the sovereign, and that all private property in land existed by his sufferance. The Mahometan theory and the corresponding Mahometan practice had put out of sight the ancient view of the sovereign's rights, which, though it assigned to him a far larger share of the produce of the land than any western ruler has ever claimed, yet in nowise denied the existence of private property in land. The English began to act in perfect good faith on the ideas which they found universally prevailing among the functionaries whom they had taken over from the Mahometan semi-independent viceroys dethroned by their arms. Their earliest experiments,

tried in the belief that the soil was theirs and that any land-law would be of their exclusive creation, have now passed into proverbs of maladroit management. The most famous of them was the settlement of Lower Bengal by Lord Cornwallis. It was an attempt to create a landed-proprietary like that of this country. The policy of conferring estates in fee simple on the natural aristocracy of certain parts of India (and I mean by a 'natural aristocracy' an aristocracy formed under purely native conditions of society by what amounts to the sternest process of natural selection) has had many fervent advocates among Indian functionaries, and has very lately been carried out on a considerable scale in the newly-conquered province of Oudh. But the great proprietors established by Lord Cornwallis were undoubtedly, with few exceptions, the tax-gatherers of the former Mahometan viceroy. The recoil from what was soon recognised as a mistake, brought a system into fashion which had been tried on a small scale at an earlier date, and which was in fact the reverse of Lord Cornwallis's experiment. In the southern provinces of the peninsula, the English Government began to recognise nothing between itself and the immediate cultivators of the soil ; and from them it took directly its share of the produce. The effect was to create a peasant-proprietary. This system, of which the chief seat was the province of Madras, has, in

my opinion, been somewhat unjustly decried. Now that it has been modified in some details, and that some mistakes first committed have been corrected, there is no more prosperous population in India than that which has been placed under it ; but undoubtedly it is not the ancient system of the country. It was not till English conquest was extending far to the north-west, and till warlike populations were subjugated whose tastes and peculiarities it was urgently necessary to study, that the true proprietary unit of India was discovered. It has ever since been most carefully and continuously observed. There have been many vehement and even violent disputes about some of its characteristics ; but these disputes will always, I think, be found to arise, or at least to derive their point, from an attempt to make it fit in with some theory of English origin. There is no substantial difference of opinion about its great features. I regret exceedingly that I cannot refer you to any book in which there is a clear or compendious account of it. Perhaps the best and most intelligible is that given by a distinguished Indian functionary, Mr. George Campbell, in that same volume on ' Systems of Land Tenure ' to which I referred you for Mr. Morier's summary of Von Maurer's conclusions. But the description is necessarily much too brief for a subject of such extent, and full information must be obtained from the extensive literature of Revenue and Settlement

which I spoke of some time since as having had its materials collected by quasi-judicial agencies. But the student who attempts to consult it should be warned that much of the elementary knowledge which has to be acquired before its value and interest can be completely understood is only at present to be gathered from the oral statements of experienced Indian functionaries. In the account of the Indian cultivating group which follows you will understand that I confine myself to fundamental points, and further that I am attempting to describe a typical form to which the village-communities appear to me upon the evidence I have seen to approximate, rather than a model to which all existing groups called by the name can be exactly fitted.

If very general language were employed, the description of the Teutonic or Scandinavian village-communities might actually serve as a description of the same institution in India. There is the arable mark, divided into separate lots but cultivated according to minute customary rules binding on all. Wherever the climate admits of the finer grass crops, there are the reserved meadows, lying generally on the verge of the arable mark. There is the waste or common land, out of which the arable mark has been cut, enjoyed as pasture by all the community *pro indiviso*. There is the village, consisting of habitations each ruled by a despotic pater-familias. And

there is constantly a council of government to determine disputes as to custom. But there are some characteristics of the institution of which no traces, or very faint traces, remain in Europe, though they probably once existed, and there are some differences between the European and Indian examples. Identity in the main being assumed, a good deal of instruction may be obtained from these distinctions of detail.

First as to the arable mark, or cultivated portion of the village domain. Here you will naturally expect the resemblances to be general rather than specific. The official publications on Indian Settlement law contain evidence that in some parts of the country the division into three common fields is to be found; but I do not attach any importance to the fact, which is probably quite accidental. The conditions of agriculture in a tropical country are so widely different from those which can at any period be supposed to have determined cultivation in Northern and Central Europe as to forbid us to look for any resemblances in India, at once widely extended and exact, to the Teutonic three-field system. Indeed, as the great agent of production in a tropical country is water, very great dissimilarities in modes of cultivation are produced within India itself by relative proximity to running streams and relative exposure to the periodical rain-fall. The true

analogy between the existing Indian and the ancient European systems of tillage must be sought in the minute but multifarious rules governing the proceedings of the cultivators; rules which in both cases have the same object—to reconcile a common plan and order of cultivation on the part of the whole brotherhood with the holding of distinct lots in the arable land by separate families. The common life of the group or community has been so far broken up as to admit of private property in cultivated land, but not so far as to allow departure from a joint system of cultivating that land. There have been functionaries serving the British Government of India who have had the opportunity of actually observing the mode in which rules of this kind grow up. Wherever the great canals of irrigation which it has constructed pass through provinces in which the system of village-communities survives in any completeness, the Government does not undertake—or perhaps I should rather say it has not hitherto undertaken—the detailed distribution of water to the peasants inhabiting the village. It bargains with them to take a certain quantity of water in return for a certain addition to the revenue assessed upon them, and leaves them, when the water has once been conducted to the arable mark, to divide it between themselves as they please. A number of minute rules for

regulating each man's share of the water and mode of using it are then imposed on the village, by the council of elders, by the elective or hereditary functionary who sometimes takes its place, or by the person who represents the community in its contracts with Government for payment of land-rent. I have been told, however, by some of those who have observed the formation of these rules, that they do not purport to emanate from the personal authority of their author or authors; nor do they assume to be dictated by a sense of equity; there is always, I am assured, a sort of fiction, under which some customs as to the distribution of water are supposed to have existed from all antiquity, although in fact no artificial supply had been even so much as thought of. It is further stated that, though it is extremely common among English functionaries to speak of the distribution of water as regulated by the agreement of the villagers, yet no such idea really enters the mind of the community or of its representatives as that there can be or ought to be an express or implied contract among the cultivators respecting their several shares. And it is added that, rather than have a contract or agreement, it would appear to them a much more natural and reasonable arrangement that the distribution should be determined by casting lots. Authority, Custom, or Chance are in fact the great sources of law in primitive communi-

ties as we know them, not Contract. Not that in the minds of men who are at this stage of thought the acknowledged sources of law are clearly discriminated. There are many customary duties of which the most plausible account that can be given is that they were at the outset obligations of kinship, sanctioned by patriarchal authority; yet childish stories attributing their origin to mere accident are often current among the Indian villagers, or they are said to be observed in obedience to the order of some comparatively modern king. I have already said that the power of the sovereign to create custom is very generally recognised in India; and it might even be said that such ideas of the obligatory force of agreement as exist are nowadays greatly mixed up with the notion of obedience to government. It is often stated that an agreement written on the stamped paper of the State acquires in the native view a quality which is quite independent of the legal operation of the stamp; and there is reason to believe that the practice, which prevails through whole provinces, of never performing an agreement till performance has been decreed by a Court, is to a very great extent accounted for by an impression that contracts are not completely binding till the State has directed them to be executed.

Among the non-Aryan peasantry who form a considerable proportion of the population in the still

thinly peopled territory called the Central Provinces, the former highroad of Mahratta brigandage, there are examples of the occasional removal of the entire arable mark from one part of the village domain to another, and of the periodical redistribution of lots within the cultivated area. But I have not obtained information of any systematic removal, and still less of any periodical re-partition of the cultivated lands, when the cultivators are of Aryan origin. But experienced Indian officials have told me that though the practice of redistribution may be extinct, the tradition of such a practice often remains, and the disuse of it is sometimes complained of as a grievance. If English influence has had anything to do with arresting customs of re-partition, which are, no doubt, quite alien to English administrative ideas, it is a fresh example of destructive influence, unwillingly and unconsciously exercised. For the separate, unchangeable, and irremovable family lot in the cultivated area, if it be a step forwards in the history of property, is also the point at which the Indian village-community is breaking to pieces. The probability, however, is that the causes have had their operation much hastened by the English, but have not been created by them. The sense of personal right growing everywhere into greater strength, and the ambition which points to wider spheres of action than can be found within the Community, are both destructive

of the authority of its internal rules. Even more fatal is the increasing feeling of the sacredness of personal obligation arising out of contract. The partition of inheritances and execution for debt levied on land are destroying the communities—this is the formula heard nowadays everywhere in India. The brotherhood of the larger group may still cohere, but the brethren of some one family are always wishing to have their shares separately; and creditors who would have feared to intrude on the village domain now break the net of custom by stepping without ceremony into the lot of a defaulting debtor.

I now pass to the village itself, the cluster of homesteads inhabited by the members of the community. The description given by Maurer of the Teutonic Mark of the Township, as his researches have shown it to him, might here again pass for an account, so far as it goes, of an Indian village. The separate households, each despotically governed by its family chief, and never trespassed upon by the footstep of any person of different blood, are all to be found there in practice; although the theory of the absolute rights of heads of families has never, from the nature of the case, been acknowledged by the British Government. But the Indian villages have one characteristic which could only have been gathered from observation of a living society. The German writers have been struck with that complete immunity of the Teutonic homestead

from all external interference, which in this country found a later expression in the long-descended common-place that an Englishman's house is his castle. But a characteristic which in India goes along with this immunity, and to a great extent explains it, is the extraordinary secrecy of family life; a secrecy maintained, I am told, in very humble households and under difficulties which at first sight would seem insurmountable. There can be no question that, if the isolation of households in ancient societies was always accompanied by this secrecy of their interior life, much which is not quite intelligible in early legal history would be explained. It is not, for example, easy to understand the tardiness with which, in Roman society, the relations of Paterfamilias and Filius-familias became the subject of moral judgment, determining the interference of the Prætor, or again taking the form of public opinion, and so ultimately issuing in legislation. But this would be much more comprehensible if the secrets of family life were nearly as carefully guarded as they are at this moment, even in those parts of India where the peculiar Mahometan jealousy, which has sometimes been erroneously thought a universal Eastern feeling, has never yet penetrated. So, again, it is only a conjectural explanation of the scantiness of ancient systems of law as they appear in the monuments in which an attempt was made to set them formally forth, that the lawgiver

merely attempted to fill, so to speak, the interstices between the families, of which the aggregation formed the society. To the extent to which existing Indian society is a type of a primitive society, there is no doubt that any attempt of the public lawgiver to intrude on the domain reserved to the legislative and judicial power of the pater-familias causes the extremest scandal and disgust. Of all branches of law, criminal law is that which one would suppose to excite least resentment by trespassing on the forbidden limits. Yet, while many ignorant statements are constantly made about the rash disturbance of native Indian ideas by British law and administration, there is really reason to believe that a grievance most genuinely felt is the impartiality of that admirable Penal Code which was not the least achievement of Lord Macaulay's genius, and which is undoubtedly destined to serve some day as a model for the criminal law of England. I have had described to me a collection of street-songs, sung in the streets of the city which is commonly supposed to be most impatient of British rule by persons who never so much as dreamed of having their words repeated to an Englishman. They were not altogether friendly to the foreign rulers of the country, but it may be broadly laid down that they complained of nothing which might naturally have been expected to be the theme of complaint. And, without exception, they declared

that life in India had become intolerable since the English criminal laws had begun to treat women and children as if they were men.

I read to you from Mr. Morier's compendium of Von Maurer's results, a passage pointedly contrasting the independence of the Teutonic freeman in his homestead and its appurtenances with his complete subjection to customary rule when he cultivated the arable mark, or pastured his sheep and cattle in the common mark. I trust there is no presumption in my saying that in some of the most learned writers on the Mark, there seems to me too great a tendency to speak of the relations of the free chiefs of Teutonic households to one another as determined by what, for want of a more appropriate term, must be called spontaneous legislation. It is no doubt very difficult, in observing an Indian village-community, to get rid of the impression that the council of elders, which is the only Indian counterpart of the collective assembly of Teutonic villagers, occasionally legislates; and, if very strict language be employed, legislation is the only term properly expressing the invention of customary rules to meet cases which are really new. Yet, if I may trust the statements of several eminent Indian authorities, it is always the fact or the fiction that this council merely declares customary law. And indeed, while it is quite true of India that the head of the family is supposed to be chief of the household

the families within the village or township would seem to be bound together through their representative heads by just as intricate a body of customary rules as they are in respect of those parts of the village domain which answer to the Teutonic common mark and arable mark. The truth is, that nothing can be more complex than the customs of an Indian village, though in a sense they are only binding on chiefs of families. The examination of these customs, which have for their object to secure a self-acting organisation not only for the community as a whole, but for the various trades and callings which fractions of it pursue, does not fall within the scope of the present Lectures, but it is a subject full of interest. I observe that recent writers are dissatisfied with the historical theory which attributes the municipal institutions of mediæval Europe to an exclusively Roman origin, and that they are seeking to take into account the usages inherited from the conquerors of the Empire. From this point of view, the customary rules securing the interdependence and mutual responsibility of the members of an Indian village-community, or of the various subordinate groups which it may be shown to include, and the modes of speech in use among them, which are said to fluctuate between language implying an hereditary brotherhood and language implying a voluntary association, appear to be worthy of careful examination. There is reason

to believe that some European cities were originally nothing more than the township-mark of a Teutonic village-community which has subsequently grown to greatness. It is quite certain that this was the origin of the large majority of the towns which you see marked on the map of India. The village, in becoming more populous from some cause or other, has got separated from its cultivated or common domain; or the domain has been swallowed up in it; or a number of different villages have been founded close together on what was perhaps at one time unprofitable waste land, but which has become exceptionally valuable through advantages of situation. This last was the origin of the great Anglo-Indian city of Calcutta, which is really a collection of villages of very modern foundation. Here, however, it may be proper that I should state that the very greatest Indian cities had a beginning of another kind. Doubtless most of the Indian towns grew out of villages, or were originally clusters of villages, but the most famous of all grew out of camps. The Mogul Emperors and the Kings of the more powerful Hindoo dynasties differed from all known sovereigns of the Western World, not only in the singular indefiniteness of the boundaries of their dominions and in the perpetual belligerency which was its consequence, but in the vast onerousness of their claims on the industry of their subjects. From the people of a country of

which the wealth was almost exclusively agricultural, they took so large a share of the produce as to leave nothing practically to the cultivating groups except the bare means of tillage and subsistence. Nearly all the movable capital of the empire or kingdom was at once swept away to its temporary centre, which became the exclusive seat of skilled manufacture and decorative art. Every man who claimed to belong to the higher class of artificers took his loom or his tools and followed in the train of the King. This diversion of the forms of industry which depend on movable wealth to the seat of the court had its first result in the splendour of Oriental capitals. But at the same time it made it easier to change their site, regarded as they continued to be in the light of the encampment of the sovereign for the time being. Great deserted cities, often in close proximity to one another, are among the most striking and at first sight the most inexplicable of Indian spectacles. Indian cities were not, however, always destroyed by the caprice of the monarch who deserted them to found another capital. Some peculiar manufacture had sometimes so firmly established itself as to survive the desertion, and these manufacturing towns sometimes threw out colonies. Capitals, ex-capitals retaining some special art or manufacture, the colonies of such capitals or ex-capitals, villages grown to exceptional greatness, and a certain number of

towns which have sprung up round the temples built on sites of extraordinary sacredness, would go far to complete the list of Indian cities.

The Waste or common land of the Village-Community has still to be considered. One point of difference between the view taken of it in the East and that which seems at all times to have been taken in Europe, deserves to be specially noted. The members of the Teutonic community appear to have valued the village waste chiefly as pasture for their cattle, and possibly may have found it so profitable for this purpose as to have deliberately refrained from increasing that cultivated portion of it which had been turned into the arable mark. These rights of pasture vested in the commoners are those, I need scarcely tell you, which have descended but little modified to our own day in our own country; and it is only the modern improvements in the methods of agriculture which have disturbed the balance between pasture and tillage, and have thus tended to multiply Inclosure Acts. But the vast bulk of the natives of India are a grain and not a flesh-eating people. Cattle are mostly regarded by them as auxiliary to tillage. The view therefore generally taken (as I am told) of the common-land by the community is that it is that part of the village-domain which is temporarily uncultivated, but which will some time or other be cultivated and merge in the arable mark. Doubtless it is valued

for pasture, but it is more especially valued as potentially capable of tillage. The effect is to produce in the community a much stronger sense of property in common-land than at all reflects the vaguer feeling of right which, in England at all events, characterises the commoners. In the later days of the East India Company, when all its acts and omissions were very bitterly criticised, and amid the general re-opening of Indian questions after the military insurrection of 1857, much stress was laid on the great amount of waste land which official returns showed to exist in India, and it was more than hinted that better government would bring these wastes under cultivation, possibly under cotton cultivation, and even plant them with English colonists. The answer of experienced Indian functionaries was that there was no waste land at all in India. If you except certain territories which stand to India Proper much as the tracts of land at the base of the Rocky Mountains stand to the United States—as, for example, the Indo-Chinese province of Assam—the reply is substantially correct. The so-called waste lands are part of the domain of the various communities which the villagers, theoretically, are only waiting opportunity to bring under cultivation. Yet this controversy elicited an admission which is of some historical interest. It did appear that, though the native Indian Government had for the most part left the village-

communities entirely to themselves on condition of their paying the revenue assessed upon them, they nevertheless sometimes claimed (though in a vague and occasional way) some exceptional authority over the wastes; and, acting on this precedent, the British Government, at the various settlements of Land Revenue, has not seldom interfered to reduce excessive wastes and to re-apportion uncultivated land among the various communities of a district. In connection with this claim and exercise of right you will call to mind the power vested in the early English Kings to make grants of waste to individuals in severalty, first with and afterwards without the consent of the Witan ; and we shall see that the much more extensive rights acquired by the lord over the waste than over any other portion of the village-domain, constitute a point of capital importance in the process known as the feudalisation of Europe.

India has nothing answering to the assembly of adult males which is so remarkable a feature of the ancient Teutonic groups, except the Council of Village Elders. It is not universally found. Villages frequently occur in which the affairs of the community are managed, its customs interpreted, and the disputes of its members decided by a single Headman, whose office is sometimes admittedly hereditary but is sometimes described as elective; the choice being generally, however, in the last case confined in practice to the

members of one particular family, with a strong preference for the eldest male of the kindred, if he be not specially disqualified. But I have good authority for saying that, in those parts of India in which the village-community is most perfect and in which there are the clearest signs of an original proprietary equality between all the families composing the group, the authority exercised elsewhere by the Headman is lodged with the Village Council. It is always viewed as a representative body, and not as a body possessing inherent authority, and, whatever be its real number, it always bears a name which recalls its ancient constitution of Five persons.

I shall have hereafter to explain that, though there are strong general resemblances between the Indian village-communities wherever they are found in anything like completeness, they prove on close inspection to be not simple but composite bodies, including a number of classes with very various rights and claims. One singular proof of this variety of interests, and at the same time of the essentially representative character of the village council, is constantly furnished, I am told, by a peculiar difficulty of the Anglo-Indian functionary when engaged in 'settling' a province in which the native condition of society has been but little broken up. The village council, if too numerous, is sure to be unmanageable; but there is great pressure from all sections of the

community to be represented in it, and it is practically hard to keep its numbers down. The evidence of the cultivators as to custom does not point, I am told, to any uniform mode of representation; but there appears to be a general admission that the members of the council should be elderly men. No example of village or of district government recalling the Teutonic assembly of free adult males has been brought to my notice. While I do not affect to give any complete explanation of this, it may be proper to remember that, though no country was so perpetually scourged with war as India before the establishment of the Pax Britannica, the people of India were never a military people. Nothing is told of them resembling that arming of an entire society which was the earliest, as it is the latest, phase of Teutonic history. No rule can be laid down of so vast a population without exceptions. The Mahratta brigands when they first rose against the Mahometans were a Hindoo Hill-tribe armed to a man; and before the province of Oudh was annexed, extreme oppression had given an universally military character to a naturally peaceful population. But, for the most part, the Indian village-communities have always submitted without resistance to oppression by monarchs surrounded by mercenary armies. The causes, therefore, which in primitive societies give importance to young men in the village assembly were wanting. The soldiers of

the community had gone abroad for mercenary service, and nothing was required of the council but experience and civil wisdom.

There is yet another feature of the Indian cultivating groups which connects them with primitive Western communities of the same kind. I have several times spoken of them as organised and self-acting. They, in fact, include a nearly complete establishment of occupations and trades for enabling them to continue their collective life without assistance from any person or body external to them. Besides the Headman or Council exercising quasi-judicial, quasi-legislative, power, they contain a village police, now recognised and paid in certain provinces by the British Government. They include several families of hereditary traders; the Blacksmith, the Harness-maker, the Shoemaker. The Brahmin is also found for the performance of ceremonies, and even the Dancing-Girl for attendance at festivities. There is invariably a Village-Accountant, an important personage among an unlettered population—so important, indeed, and so conspicuous that, according to reports current in India, the earliest English functionaries engaged in settlements of land were occasionally led by their assumption that there must be a single proprietor somewhere, to mistake the Accountant for the owner of the village, and to record him as such in the official register. But the person

practising any one of these hereditary employments is really a servant of the community as well as one of its component members. He is sometimes paid by an allowance in grain, more generally by the allotment to his family of a piece of cultivated land in hereditary possession. Whatever else he may demand for the wares he produces, is limited by a customary standard of price, very rarely departed from. It is the assignment of a definite lot in the cultivated area to particular trades, which allows us to suspect that the early Teutonic groups were similarly self-sufficing. There are several English parishes in which certain pieces of land in the common field have from time immemorial been known by the name of a particular trade; and there is often a popular belief that nobody, not following the trade, can legally be owner of the lot associated with it. And it is possible that we here have a key to the plentifulness and persistence of certain names of trades as surnames among us.

It is a remarkable fact that certain callings, extremely respectable and lucrative, do not appear in India to constitute those who follow them members of the village-community. Eminent officials have assured me that, so far as their experience extends, the Grain-dealer is never a hereditary trader incorporated with the village group, nor is he a member of the municipality in towns which have

grown out of one or more villages. The trades thus remaining outside the organic group are those which bring their goods from distant markets; and I shall try to show the significance of this fact hereafter.

There are in Central and Southern India certain villages to which a class of persons is hereditarily attached in such a manner as to show most unmistakeably that they form no part of the natural and organic aggregate to which the bulk of the villagers belong. These persons are looked upon as essentially impure; they never enter the village, or only enter reserved portions of it; and their touch is avoided as contaminating. It is difficult to read or listen to the accounts given of them without having the mind carried to those singular races or classes which, in certain European countries, were supposed almost to our own day to transmit from father to son the taint of a mysterious uncleanness. Yet these Indian 'outsiders,' as they have been called (by Sir H. B. Frere in 'The Church and the Age,' p. 357), to avoid using the word 'outcast,' which has a different meaning, bear extremely plain marks of their origin. Though they are not included in the village, they are an appendage solidly connected with it; they have definite village duties, one of which is the settlement of boundaries, on which their authority is allowed to be conclusive. They evidently represent

a population of alien blood, whose lands have been occupied by the colonists or invaders forming the community. Everybody who has used his eyes in India will be on his guard against certain extravagances of the modern theory of Race, and will be slow to believe that identity of language and identity of religion necessarily imply identity of ethnical origin. The wonderful differences of external aspect which are readily perceived between natives of Indian provinces speaking the same language, and the great deviation from what is regarded as the Aryan type of form and feature observable among populations whose speech is a near derivative from Sanscrit, have their most reasonable explanation in the power of absorption which the village group may from many indications be inferred to have possessed in the earlier stages of development. But the faculty of taking in strangers from without is one which it loses in time, and there were always probably some materials too obstinately and obtrusively foreign to be completely absorbed. Under this last head, the 'outsiders' of the Southern villages apparently fall.

LECTURE V.

THE PROCESS OF FEUDALISATION.

CONTENTS.

Feudalism—The Benefices—The Manor—The Manorial Group—New Condition of the Waste—Changes in the Grass-lands—The Free Tenants—Settlements of Villeins—The Manorial Courts—Encroachments of the Lord—Roman and Feudal Law—Causes of Feudalisation—Growth of Suzerainties—Leading Families—Elements of Feudal System—Systematic Feudalism—Antiquarianism of Indian Politics—Political Results of Settlements—Various Forms of Settlement—Growth in Power of Official Holder—Mahometan Assumptions—Indian Schools of Opinion—Indian Forms of Property—The Headman—Property Recognised by the English—Absolute Ownership—Nature of Rights of Property—Development of Absolute Ownership—Vested Rights in India—The Feudalisation of Europe—Cultivation of Waste-land—Improvements in Tillage—Village-Communities and Customs—Customary Tillage—Servile Dependants of Villagers—Villages Cease to Absorb Strangers—Nasse's Work—The Statute of Devises—Rules for Construing Wills—Restraints on Testamentary Power.

LECTURE V.

THE PROCESS OF FEUDALISATION.

The student of legal antiquities who has once convinced himself that the soil of the greatest part of Europe was formerly owned and tilled by proprietary groups, of substantially the same character and composition as those which are still found in the only parts of Asia which are open to sustained and careful observation, has his interest immediately drawn to what, in truth, is the great problem of legal history. This is the question of the process by which the primitive mode of enjoyment was converted into the agrarian system, out of which immediately grew the land-law prevailing in all Western Continental Europe before the first French Revolution, and from which is demonstrably descended our own existing real-property law. For this newer system no name has come into general use except Feudalism, a word which has the defect of calling attention to one set only of its characteristic incidents. We cannot reasonably doubt that one partial explanation of its origin is, so far as it goes, correct. It arose from or was greatly

influenced by the Benefices, grants of Roman provincial land by the chieftains of the tribes which overran the Roman Empire ; such grants being conferred on their associates upon certain conditions, of which the commonest was military service. There is also tolerably universal agreement that somewhere in Roman law (though *where*, all are not agreed) are to be found the rules which determined the nature of these beneficiary holdings. This may be called the theory of the official origin of feudalism, the enjoyment of land being coupled with the discharge of certain definite duties ; and there are some who complete the theory by asserting that among the Teutonic races, at all events, there was an ineradicable tendency in all offices to become hereditary, and that thus the Benefices, which at first were held for life, became at last descendible from father to son.

There is no question, as I said, that this account is more than probable, and that the Benefices either began or hastened the changes which led ultimately to feudalism. Yet I think that nobody whose mind has dwelt on the explanation, has brought himself to regard it as complete. It does not tell us how the Benefices came to have so extraordinary a historical fortune. It does not account for the early, if partial, feudalisation of countries like Germany and England, where the cultivated soil was in the hands of free and fully organised communities, and was not, like the

land of Italy or Gaul, at the disposal of a conquering king—where the royal or national grants which resembled the Benefices were probably made out of waste land—and where the influence of Roman law was feebly felt or not at all.

The feudalisation of any one country in Europe must be conceived as a process including a long series of political, administrative, and judicial changes ; and there is some difficulty in confining our discussion of it to changes in the condition of property which belong more properly to this department of study. But I think we may limit our consideration of the subject by looking at it in this way. If we begin with modern English real-property law, and, by the help of its records and of the statutes affecting it, trace its history backwards, we come upon a period at which the soil of England was occupied and tilled by separate proprietary societies. Each of these societies is, or bears the marks of having been, a compact and organically complete assemblage of men, occupying a definite area of land. Thus far it resembles the old cultivating communities, but it differs from them in being held together by a variety of subordinate relations to a feudal chief, single or corporate, the Lord. I will call the new group the Manorial group, and though my words must not be taken as strictly correct, I will say that a group of tenants, autocratically organised and governed, has succeeded a

group of households of which the organisation and government were democratic. The new group, as known to our law, is often in a state of dissolution, but, where it is perfect, it consists of a number of persons holding land of the Lord by free tenures, and of a number of persons holding land of the Lord by tenures capable of being shown to have been, in their origin, servile—the authority of the Lord being exercised over both classes, although in different ways, through the agency of a peculiar tribunal, the Court Baron. The lands held by the first description of tenants are technically known as the Tenemental lands ; those held by the second class constitute the Lord's Domain. Both kinds of land are essential to the completeness of the Manorial group. If there are not Tenemental lands to supply a certain minimum number of free tenants to attend the Court Baron, and, according to the legal theory, to sit with the lord as its judges, the Court Baron can no longer in strictness be held ; if it be continued under such circumstances, as it often was in practice, it can only be upheld as a Customary Manorial Court, sitting for the assessment and receipt of customary dues from the tenants of the Domain. On the other hand, if there be no Domain, or if it be parted with, the authority of the Lord over the free tenants is no longer Manorial ; it becomes a Seignory in gross, or mere Lordship.

Since much of the public waste land of our country is known to have passed by national or royal grant to individuals or corporations, who, in all probability, brought it extensively under cultivation from the first by servile labour, it cannot be supposed that each of the new Manorial groups takes the place of a Village group which at some time or other consisted of free allodial proprietors. Still, we may accept the belief of the best authorities that over a great part of England there has been a true succession of one group to the other. Comparing, then, the two, let us ask what are the specific changes which have taken place? The first, and far the most important of all, is that, in England as everywhere in Western Europe, the waste or common-land of the community has become the lord's waste. It is still ancillary to the Tenemental lands; the free tenants of the lord, whom we may provisionally take to represent the freemen of the village-community, retain all their ascertained rights of pasture and gathering firewood, and in some cases similar rights have been acquired by other classes; but, subject to all ascertained rights, the waste belongs, actually or potentially, to the lord's domain. The lord's 'right of approvement,' affirmed by the Statute of Merton, and extended and confirmed by subsequent statutes, permits him to enclose and appropriate so much of the waste as is not wanted to satisfy other existing rights; nor can it be doubted

that he largely exercises this right, reclaiming part of the waste for himself by his personal dependants and adding it to whatever share may have belonged to him from the first in the cultivated land of the community, and colonising other portions of it with settlements of his villeins who are on their way to become copyholders. The legal theory has altogether departed from the primitive view; the waste is now the lord's waste; the commoners are for the most part assumed to have acquired their rights by sufferance of the lord, and there is a visible tendency in courts and text-writers to speak of the lord's rights, not only as superior to those of the commoners, but as being in fact of greater antiquity.

When we pass from the waste to the grass lands which were intermediate between the common land and the cultivated area, we find many varieties in the degree of authority acquired by the lord. The customs of manors differ greatly on the point. Sometimes, the lord encloses for his own benefit from Candlemas to Midsummer or Lammas, and the common right belongs during the rest of the year to a class of burgesses, or to the householders of a village, or to the persons inhabiting certain ancient tenements. Sometimes, the lord only regulates the inclosure, and determines the time of setting up and removing the fences. Sometimes, other persons enclose, and the lord has the grass when the several

enjoyment comes to an end. Sometimes, his right of pasture extends to the baulks of turf which separate the common arable fields ; and probably there is no manorial right which in later times has been more bitterly resented than this, since it is practically fatal to the cultivation of green crops in the arable soil.

Leaving the meadows and turning to the lands under regular tillage, we cannot doubt that the free holders of the Tenemental lands correspond in the main to the free heads of households composing the old village-community. The assumption has often been made, and it appears to be borne out by the facts which can be established as to the common fields still open or comparatively lately enclosed. The tenure of a certain number of these fields is freehold ; they are parcelled out, or may be shown to have been in the last century parcelled out, among many different owners ; they are nearly always distributed into three strips, and some of them are even at this hour cultivated according to methods of tillage which are stamped by their very rudeness as coming down from a remote antiquity. They appear to be the lands of a class which has never ceased to be free, and they are divided and cultivated exactly as the arable mark of a Teutonic township can be inferred, by a large induction, to have been divided and tilled But, on the other hand, many large tracts of inter-

mixed land are still, or were till their recent enfranchisement, copyhold of particular manors, and some of them are held by the intermediate tenure, known as customary freehold, which is confined by the legal theory to lands which once formed part of the King's Domain. I have not been able to ascertain the proportion of common lands held by these base tenures to freehold lands of the same kind, but there is no doubt that much commonable or intermixed land is found, which is not freehold. Since the descent of copyhold and customary freehold tenures from the holdings of servile classes appears to be well established, the frequent occurrence of intermixed lands of this nature seems to bear out the inference suggested by Sir H. Ellis's enumeration of the conditions of men referred to in Domesday Book, that, during the long process of feudalisation, some of the free villagers sank to the status, almost certainly not a uniform status, which was implied in villenage. (See also Mr. Freeman's remark, 'Hist. Norm. Conq.' i. 97.) But evidence, supplied from quarters so wide apart as British India and the English settlements in North America, leads me to think that, at a time when a system of customary tillage widely prevailed, assemblages of people planted on waste land would be likely to copy the system literally; and I conjecture that parts of the great wastes undoubtedly reclaimed by the exercise of the right afterwards called the

lord's 'right of approvement' were settled by servile colonies modelled on the ancient Teutonic township.

The bond which kept the Manorial group together was evidently the Manorial Court, presided over by the lord or his representative. Under the name of Manorial Court three courts are usually included, which legal theory keeps apart, the Court Leet, the Court Baron, and the Customary Court of the Manor. I think there cannot be reasonable doubt of the legitimate descent of all three from the assembly of the Township. Besides the wide criminal and civil jurisdiction which belonged to them, and which, though it has been partly abolished, has chiefly lost its importance through insensible decay, they long continued in the exercise of administrative or regulative powers which are scarcely distinguishable from legislation. Other vestiges of powers exerted by the collective body of free owners at a time when the conceptions of legislative and judicial authority had not yet been separated, remained in the functions of the Leet Jury; in the right asserted for the free tenants of sitting as Judges in the Court Baron; and in the election of various petty officers. It is true that, as regards one of these Courts, the legal theory of its character is to a certain extent inconsistent with the pedigree I have claimed for it. The lawyers have always contended that the Court Leet only existed through the King'

grant, express or implied; and in pursuance of the same doctrine they have laid down that, whereas the lord might himself sit in the Court Baron, he must have a person of competent legal learning to represent him in the Court Leet. But this only proves that the Court Leet, which was entrusted with the examination of the Frankpledge, had more public importance than the other Manorial Courts, and was therefore more distinctly brought under the assumption which had been gradually forming itself, that royal authority is the fountain of all justice. Even in the last extremity of decline, the Manorial Courts have not wholly ceased to be regarded as the tie which connects the common interests of a definite group of persons engaged in the cultivation of the soil. Marshall ('Rural Economy of Yorkshire,' i. 27) mentions the remarkable fact that these Courts were sometimes kept up at the beginning of the century by the voluntary consent of the neighbourhood in certain districts where, from the disappearance of the servile tenures which had enabled the Customary Courts to be continued, the right to hold them had been forfeited. The manorial group still sufficiently cohered for it to be felt that some common authority was required to regulate such matters as the repair of minor roads, the cleansing of rivulets, the ascertainment of the sufficiency of ring-fences, the assessment of the damages of impounded cattle, the removal of nuisances, and the stocking of commons.

On the whole, the comparison of the Village group with the English group which I have called Manorial rather than Feudal, suggests the following general observations. Wherever that collective ownership of land which was a universal phenomenon in primitive societies has dissolved, or gone far to dissolve, into individual property, the individual rights thus formed have been but slightly affected by the process of feudalisation. If there are reasons for thinking that some free village societies fell during the process into the predial condition of villenage—whatever that condition may really have implied—a compensating process began at some unknown date, under which the base tenant made a steady approach to the level of the freeholder. Even rights which savoured of the collective stage of property were maintained comparatively intact, provided that they were ascertained: such as rights of pasture on the waste and rights of several or of common enjoyment (as the case might be) in the grass land. The encroachments of the lord were in proportion to the want of certainty in the rights of the community. Into the grass land he intruded more than into the arable land; into the waste much more than into either. The conclusion suggested to my mind is that, in succeeding to the legislative power of the old community, he was enabled to appropriate to himself such of its rights as were not immediately valuable, and which, in the event of their becoming valuable, required legislative

adjustment to settle the mode of enjoying them. Let me add that the general truth of my description of the character of the change which somehow took place, is perhaps rendered antecedently more probable by the comparison of a mature, but non-feudal, body of jurisprudence, like the Roman law, with any deeply feudalised legal system. You will remember the class of enjoyable objects which the Roman lawyers call *res nullius*, *res publici usûs*, *res omnium* or *universorum ;* these it reserves to the entire community, or confers on the first taker. But, under feudalised law, nearly all these objects which are capable of several enjoyment belong to the lord of the manor, or to the king. Even Prize of War, the most significant of the class, belongs theoretically to the sovereign in the first instance. By a very singular anomaly, which has had important practical results, Game is not strictly private property under English law ; but the doctrine on the subject is traceable to the later influence of the Roman law.

There must be a considerable element of conjecture in any account which may be given of a series of changes which took place for the most part in remote antiquity, and which probably were far from uniform either in character or in rate of advance. It happens, however, that the vestiges of the earlier stages of the process of feudalisation are more discernible in Germany than elsewhere, both in docu

mentary records and on the face of the land; owing in part no doubt to the comparatively feeble action of that superior and central authority which has obliterated or obscured so much in our own country. A whole school of writers, among whom Von Maurer has the first place, has employed itself in restoring and interpreting these traces of the Past. How did the Manor rise out of the Mark?—this is their way of stating the problem. What were the causes of indigenous growth which, independently of grants of land by royal or national authority, were leading to a suzerainty or superiority of one cultivating community over another, or of one family over the rest of the families composing the village-community? The great cause in the view of these writers was the exceeding quarrelsomeness of these little societies, and the consequent frequency of intertribal war. One community conquers another, and the spoil of war is generally the common mark or waste of the worsted community. Either the conquerors appropriate and colonise part of the waste so taken, or they take the whole domain and restore it to be held in dependence on the victor-society. The change from one of these systems to another occurred, you will remember, in Roman history, and constitutes an epoch in the development of the Roman Law of Property. The effect of the first system on the Teutonic communities was inequality of property; since the common land

appropriated and occupied does not seem to have been equally divided, but a certain preference was given to the members of the successful community who had most effectually contributed to the victory. Under the second system, when its land was restored to the conquered society, the superiority over it which remained to the victor, bore the strongest analogy to a suzerainty or lordship. Such a suzerainty was not, however, exclusively created by success in war. Sometimes a community possessed of common land exceptionally extensive or exceptionally fertile would send colonies of families to parts of it. Each of these new communities would receive a new arable mark, but such of the land as remained unappropriated would still be the common land of all the townships. At the head of this sort of confederacy there would, however, be the original mother-community from which the colonists proceeded, and there seems no doubt that in such a state of things she claimed a superiority or suzerainty over all the younger townships.

But, even if we had the fullest evidence of the growth of suzerainties in this inchoate shape, we should still have advanced a very little way in tracing the transmutation of the village system into the manorial system, if it were not for another phenomenon to which Landau has more particularly called attention. The Teutonic communities, though their organisation (if modern language must be employed)

can only be described as democratic, appear nevertheless to have generally had an abiding tradition that in some one family, or in some families, the blood which ran in the veins of all the freemen was purest; probably because the direct descent of such family or families from a common ancestor was remembered or believed in. From the members of these families, the leader for a military expedition would as a rule be chosen; but as in this stage of thought the different varieties of power were not distinguished from one another, the power acquired by the chieftain would be a combination of political, military, and judicial power. The choice of the leader would in great emergencies be a true election, but on less serious occasions would tend to become an acquiescence in the direction of the eldest male agnate of the family which had the primacy of the township. Similarly the power which had at first been more military than anything else, would in more peaceful times tend rather to assume a political and judicial form. The leader thus taken from the privileged family would have the largest share of the lands appropriated from conquered village-societies; and there is ground for supposing that he was sometimes rewarded by an exceptionally large share of the common land belonging to the society which he had headed. Everything in fact which disturbed the peaceful order of the village system led to the aggrandisement of the leading

family and of its chief. Among the privileges which he obtained was one of which the importance did not show itself till much later. He became powerful enough in his own township to sever his own plot of land from the rest, and, if he thought fit, to enclose it; and thus to break up or enfeeble that system of common cultivation under rules of obligatory custom which depended mainly on the concurrence of all the villagers.

There were therefore, in the cultivating communities of the German and Scandinavian races, causes at work which were leading to inequality of property in land. There were causes at work which were leading to the establishment of superiorities or suzerainties of one township over another. There were causes at work which tended to place the benefits of an unequal proprietary system and the enjoyment of these suzerainties in the hands of particular families, and consequently of their chiefs for the time being. Here you have all the elements of the system we are compelled to call feudal. But the system in its ultimate development was the result of a double set of influences. One set, which I have been describing, were of primitive growth. Another showed themselves when powerful Teutonic monarchies began to be formed, and consisted in grants of national waste land or of the soil of conquered provinces. Doubtless some of the grantees were chiefs of families already

risen to power under indigenous Teutonic conditions; but in any case a Beneficiary would be a chieftain of a peculiarly powerful class. The cultivators of his land would either be persons settled on it by himself, or they would be vanquished provincials who had no rights which he did not choose to recognise or concede. It is not, therefore, surprising that there should have been a completer constitution of feudalism in the countries which at the time of conquest were filled with Romanised populations. The mould would be Teutonic, but the materials would be unusually plastic, and here would more especially come into play the influence of Roman law, giving precision to relations which under purely Teutonic social conditions may have been in a high degree vague and indefinite. It is well known that this systematic feudalism reacted upon the more purely Teutonic societies and gave an impulse to changes which were elsewhere proceeding at a slower pace.

I have very briefly summarised the results of a very long and laborious enquiry, and only so far as is necessary for my immediate purpose. Merely remarking that I can see little or nothing in the conclusions of these eminent German writers which is out of harmony with the account given by English scholars of the parallel phenomena of change manifested in England before the Conquest, I proceed to ask, following the scheme of these Lectures, whether

the experience of Englishmen in India throws any light or has any bearing upon the questions which have been occupying us? It is not too much to say that the phenomena observed in the East, and those established in the West by historical research, illustrate one another at every point. In India these dry bones live. Not only, as I have told you, is the Village-Community the basis of British administration in those provinces in which the art of government has to be practised with skill and caution, but a number of controversies turning on the mode of transition from the village system to what I have called the manorial system are as earnestly, and sometimes even as violently, debated by our countrymen in the East as are the great aspects of politics among ourselves. All Indian disputes take, I should explain, a historical or antiquarian shape. The assumption universally made is that the country must be governed in harmony with the established usages of the natives, and each administrative school has therefore to justify its opinions by showing that the principles to which it adheres are found in some sense or other to underlie the known customary law of India. The extravagance of partisanship which here shows itself in unqualified assertion of the universal applicability of general propositions has its Indian counterpart in unqualified assertion of the universal existence of particular customs. The Indian controversy is, how

ever, a controversy about facts which, though they are more complex than the disputants suppose, are nevertheless much simpler than the material of English political controversy; and the results are therefore proportionately more instructive to the bystander who has entire sympathy with neither party.

Let us suppose a province annexed for the first time to the British Indian Empire. The first civil act of the new government is always to effect a settlement of the land revenue; that is, to determine the amount of that relatively large share of the produce of the soil, or of its value, which is demanded by the sovereign in all Oriental States, and out of which all the main expenses of government are defrayed. Among the many questions upon which a decision must be had, the one of most practical importance is, 'Who shall be settled with?'—with whom shall the settlement be made? What persons, what bodies, what groups, shall be held responsible to the British Government for its land revenue? What practically has to be determined is the unit of society for agrarian purposes; and you find that, in determining it, you determine everything, and give its character finally to the entire political and social constitution of the province. You are at once compelled to confer on the selected class powers co-extensive with its duties to the sovereign. Not that the assumption is ever made that new proprietary powers are conferred on it,

but what are supposed to be its rights in relation to all other classes are defined; and in the vague and floating order of primitive societies, the mere definition of a right immensely increases its strength. As a matter of fact, it is found that all agrarian rights, whether superior or subordinate to those of the person held responsible to Government, have a steady tendency to decay. I will not ask you to remember the technical names of the various classes of persons 'settled with' in different parts of India—Zemindars, Talukdars, Lumberdars—names which doubtless sound uncouth, and which, in fact, have not an identical meaning throughout the country—but I dwell on the fact that the various interests in the soil which these names symbolise are seen to grow at the expense of all others. Do you, on entering on the settlement of a new province, find that a peasant proprietary has been displaced by an oligarchy of vigorous usurpers, and do you think it expedient to take the government dues from the once oppressed yeomen? The result is the immediate decline, and consequently bitter discontent, of the class above them, who find themselves sinking to the footing of mere annuitants on the land. Such was the land settlement of Oudh, which was shattered to pieces by the Sepoy mutiny of 1857, and which greatly affected its course. Do you, reversing this policy, arrange that the superior holder shall be answerable to Government? You find that you have

created a landed aristocracy which has no parallel in wealth or power except the proprietors of English soil. Of this nature is the more modern settlement of the province of Oudh, only recently consummated; and such will ultimately be the position of the Talukdars, or Barons, among whom its soil has been divided. Do you adopt a policy different from either of those which I have indicated and make your arrangements with the representative of the village-community? You find that you have arrested a process of change which was steadily proceeding. You have given to this peculiar proprietary group a vitality which it was losing, and a stiffness to the relations of the various classes composing it which they never had before.

It would be a mere conceit to try to establish any close analogy between the Teutonic Kings and the British government of India. Yet, so much as this is true and instructive. The only owner of the soil of India with whom the English Government has any relations, is, in its eyes, a mere functionary. It chooses him where it pleases, and exacts from him services, chiefly pecuniary, but to a certain small extent personal. It is found, however, that when an official appointed by a powerful government acts upon the loose constitution of a primitive society he crushes down all other classes and exalts that to which he himself belongs. But for recent legislation this

process would have gone to any length in India, and would have assuredly affected many other provinces than those which were its immediate theatre. It may, at least, be said that by observing it we gain a clearer conception of the effect of beneficiary gifts on the general tenure of land, and that we better understand the enormous power acquired by the chieftains who rendered immediate services to the Teutonic kings.

The English in India appear to have started with the assumption of the Mahometans that the sovereign might lawfully select anybody he pleased as the collector of his revenue; but they soon accepted the principle that the class to be 'settled with' was the class best entitled to be regarded as having rights of property in the soil. At a later date they discovered that, even when this class was determined, they had to decide what it was that proprietary rights over Indian land implied, and what powers they carried with them. No questions fuller of inherent difficulties were ever proposed for solution. As regards the first of them, the functionaries administering India might, with some eminent exceptions, but still not unfairly, be distributed into two great schools—the partisans of the theory that the soil belongs to the peasantry either as individuals or as organised in groups; and the partisans of the theory that ownership of the soil ought to be, and but for British influence would be, everywhere in India vested in some sort of native aristocracy. As regards the second

question, the Indian officials are much more exactly divided into those who contend that the highest right of property acknowledged to exist over the soil carries with it the same powers which attach to an English owner in fee-simple of the present day, and into those who are of opinion that, if these powers are to square with native idea and custom, they must be more or less limited and controlled. The controversies on these two points are the most vehemently debated of Indian disputes; and none ever presented greater difficulties to the person who tries to form an opinion on their merits, not from his own knowledge but upon the evidence supplied to him by others. He finds men of the utmost experience, of trained power of observation, and of the most unquestionable good faith, stating precisely opposite conclusions with precisely equal positiveness. But if he avail himself of the advantage given him by the parallel facts of European tenure, he will, perhaps, venture to have an opinion, and to think that in these, as in many other fierce disputes, both sides are right and both sides are wrong.

There is no doubt that the first point at issue was much obscured, and attention diverted to irrelevant matter, by the unlucky experiment tried at the end of the last century by Lord Cornwallis. A province, like Bengal Proper, where the village system had fallen to pieces of itself, was the proper field for the creation of a peasant proprietary; but Lord Cornwallis

turned it into a country of great estates, and was compelled to take his landlords from the tax-gatherers of his worthless predecessors. The political valuelessness of the proprietary thus created, its failure to obtain any wholesome influence over the peasantry, and its oppression of all inferior holders, led not only to distrust of the economical principles implied in its establishment, but to a sort of reluctance to believe in the existence of any naturally privileged class in the provinces subsequently acquired and examined. The most distinguished public servants of that day have left much on record which implies an opinion that no ownership of Indian land was discoverable, except that of the village-communities, subject to the dominion of the State.

But in fact it appears that, of all the landmarks on the line of movement traced by German and English scholars from the Village group to the Manorial group, there is not one which may not be met with in India, saving always the extreme points at either end. I have not had described to me any village-community under the unmodified collective government of the heads of households, but there are those who think they find the vestiges of the original constitution in a sort of democratic spirit and habit of free criticism which prevail even when the government has passed to an hereditary officer. If any thoroughly authenticated example could be produced

of a community exercising absolute liberty of choice in electing its Headman, it would point still more significantly to an unmodified original equality; but the preference alleged to be invariably shown to the members of particular families appears to show that these elections belong really to the phenomena of hereditary succession. It is not, however, disputed that villages are found in great numbers in which the government is lodged with a council, neither claiming to be nor regarded as being anything more than a representation of the entire cultivating body The instances, however, in which the authority has passed to some particular family or families are extremely numerous. Sometimes the office of Headman belongs absolutely to the head of a particular family; sometimes it belongs to him primarily, but he may be set aside for incapacity or physical blemish; sometimes there is a power of choosing him limited to an election between the members of one or more privileged households. The powers which he enjoys—or which it perhaps should be said, he would enjoy under native conditions of society—are also very various. But the judicial power of mediating in disputes and of interpreting customs appears to be certainly vested in him, together with the duty of keeping order; and, independently of the functions which he discharges with the consent of his neighbours, the British Government often expressly

confides to him a certain amount of regular jurisdiction and of regular authority in matters of police.

There is no question that many of the families whom the English have recognised as owners of villages were privileged families enjoying the primacy of the township; but the widest difference of opinion has prevailed as to the nature and origin of the rights claimed by certain families for their chiefs over whole tracts of country, embracing the domain of several village-communities. It has been strongly contended on one side that these great proprietors are nothing but the descendants of farmers of the revenue under Native Governments; on the other it is asserted that in some cases at all events they were Chieftains of Clans who were selected by preference to represent the Royal or Imperial native government in districts in which they had an hereditary influence. There appears to me reasonable evidence that this last theory is true of certain localities in India. Clan society is also in Europe the Celtic form of the family organisation of society; and, for myself, I have great difficulty in conceiving the origin of customary law otherwise than by assuming the former existence of larger groups, under patriarchal chieftains, which at a later date dissolved into the independent collections of families forming the cultivating communities of the Teutonic (including the Scandinavian) races and of the Hindoos.

If it be taken for granted that the English in India

were bound to recognise rights of property somewhere, their selection of the persons in whom these rights should vest does not seem to have been as absurd as the adherents of one Indian school are in the habit of hinting, if not of asserting. Claims to some sort of superior right over land in fact existed which corresponded to every single stage through which the conception of proprietorship has passed in the Western world, excepting only the later stages. The variety of these claims was practically infinite, and not only did not diminish, but greatly increased, as native customs and ideas were more accurately examined. Even when the village-communities were allowed to be in some sense the proprietors of the land which they tilled, they proved on careful inspection not to be simple groups, but highly composite bodies, composed of several sections with conflicting and occasionally with irreconcilable claims. The English officials solved a problem of almost hopeless perplexity by registering all the owners of superior rights as landowners, their conception of ownership being roughly taken from their own country; but the fundamental question very soon revived under another form in the shape of the second issue disputed between the Indian administrative schools, which is, whether proprietorship in India is to be taken to be the same assemblage of powers which constitutes the modern English ownership of land in fee-simple.

It seems to me that the error of the school which asserts the existence of strong proprietary rights in India lies much less in merely making this assertion than in assuming the existence of a perfect analogy between rights of property as understood in India and as understood in this country. The presumption is strongly against the reality of any such correspondence. The rights of property are, in the eye of the jurist, a bundle of powers, capable of being mentally contemplated apart from one another and capable of being separately enjoyed. The historical enquirer can also, whenever there are materials for a history of the past, trace the gradual growth of the conception of absolute property in land. That conception appears to me, for reasons which I shall afterwards assign, to have grown out of the ownership of the lord in that portion of his domain which he cultivated by his immediate personal dependants, and therefore to be a late and gradually matured fruit of the feudalisation of Europe. A process closely resembling feudalisation was undoubtedly once at work in India; there are Indian phenomena answering to the phenomena of nascent absolute ownership in England and Europe; but then these Indian phenomena, instead of succeeding one another, are all found existing together at the present moment. The feudalisation of India, if so it may be called, was never in fact completed. The characteristic signs of its consummation are wanting. It may

be doubted whether in any single instance the whole power of regulating the affairs of the village-community had passed to an hereditary official when the English entered the country; on the other hand, in the enormous majority of examples there are peculiarities of organisation which show conclusively that the village-group is either unmodified or has not yet nearly passed into the manorial group. Even, however, were we at liberty to believe that India has been completely feudalised, we should still be as far as possible from being entitled to assume that the highest Indian form of ownership corresponds to the absolute ownership of the English holder in fee-simple. It has been said that many persons talk and write as if all the Englishmen who lived between the Norman Conquest and the Reformation lived at exactly the same time; but this Indian assumption implies that there has been no change in our conception of landed property between the epoch at which England became completely feudal and the epoch (let us say) at which the Corn-laws were repealed. Yet during all these centuries England has been legislatively and to a great extent judicially centralised, and has been acted on by economical influences of very great uniformity. India, from the earliest ages till the British entered it, was under the dominion of comparatively powerful kings, who swept away the produce of the labour of the village-communities and carried off the

young men to serve in their wars, but did not otherwise meddle with the cultivating societies. This was doubtless the great cause of their irregular development. Intertribal wars soon gave way to the wars of great kings leading mercenary armies, but these monarchs, with few and doubtful exceptions, neither legislated nor centralised. The village-communities were left to modify themselves separately in their own way.

This subject is one of much practical importance, and I propose to treat of the more difficult problems which it raises in the next Lecture; at present I will content myself with repeating that there seems to me the heaviest presumption against the existence in any part of India of a form of ownership conferring the exact rights on the proprietor which are given by the present English ownership in fee-simple. There are now, however, a vast number of vested rights in the country, fully recognised by the English Government, which assume the identity of Indian and English proprietorship, and neither justice nor policy permits them to be disturbed. Moreover it is abstractedly possible that further observation of particular localities by accurate observers may, so far as regards those localities, rebut the presumption of which I have spoken, provided that the enquirer be acquainted with the parallel phenomena which belong to European legal history, and provided that he possess

the faculty, not very common among us, of distinguishing the rudimentary stages of legal thought from its maturity. The way in which, among the unlettered members of a primitive society, law and morality run into one another ought especially to be studied. The subordinate holder who in India states that the superior holder has the power to do a certain act, but that he ought not to do it, does not make an admission; he raises a question of the utmost difficulty.

It has been usual to speak of the feudalisation of Western Europe as if it had been an unmixed evil, and there is but too much reason to believe that it was accompanied in its course by a great amount of human suffering. But there are some facts of Indian experience which may lead us to think that the advantage of some of the economical and juridical results which it produced has been underrated. If the process indeed had really consisted, as some of the enthusiasts for its repetition in India appear to suppose that it did, merely in the superposition of the lord over the free owners of land, with power to demand such services or dues as he pleased and to vary his demands at pleasure, very little indeed could be said for it. But this picture of it is certainly untrue of our own country. We are not at liberty to assume that the obligations incurred by the free owner of land who *commended* himself to a lord were other than, within certain limits, fixed and

definite services; and the one distinguishing characteristic which the English feudists discover in that free Socage tenure for which the English villagers most probably exchanged their allodial ownership is certainty, regularity and permanence of service. The great novelties which the transition from one form of property to another produced were, the new authority over the waste which the lord acquired (and which was connected with the transfer to him of the half judicial, half legislative, powers of the collective community) and the emancipation of the lord within his own domains from the fetters of obligatory agricultural custom. Now Europe was then full of great wastes, and the urgent business in hand was to reclaim them. Large forests were to be felled, and wide tracts of untilled land had to be brought under cultivation. In England, inexorably confined within natural boundaries, there pressed with increasing force the necessity for adopting the methods of agriculture which were fitted to augment the total supply of food for a growing population. But for this work society organised in village-communities is but little adapted. The Indian administrators who regard the cultivating groups with most favour, contend that they secure a large amount of comfort and happiness for the families included within them, that their industry is generally, and that their skill is occasionally, meritorious. But their admirers certainly do not claim for them that

they readily adopt new crops and new modes of tillage, and it is often admitted that they are grudging and improvident owners of their waste-land. The British Government, as I before stated, has applied a remedy to this last defect by acting on the right to curtail excessive wastes which it inherited from its predecessors; and of late years it has done its utmost to extend and improve the cultivation of one great staple, Cotton—amid difficulties which seem to be very imperfectly understood by those who suppose that in order to obtain the sowing of a new crop, or the sowing of an old crop in a new way, from a peasant in bondage to hereditary custom, it is enough to prove to him that it is very likely to be profitable. There is Indian evidence that the forms of property imitated from modern English examples have a value of their own, when reclamation has to be conducted on a large scale, or novelties in agriculture have to be introduced. The Zemindars of Lower Bengal, the landed proprietary established by Lord Cornwallis, have the worst reputation as landlords, and appear to have frequently deserved it; but the grants of land originally made to them included great uncultivated tracts, and at the time when their power over subordinate holders was least limited they brought large areas of waste-land under tillage by the colonies of peasants which they planted there. The proprietorship conferred on them has also much to do

with the introduction into Lower Bengal, nearly alone among Indian provinces, of new and vast agricultural industries, which, if they had been placed under timely regulation (which unfortunately they were not) would have added as much to the comfort of the people as they have added to the wealth of the country.

It appears therefore to me to be highly probable that the autocratically governed manorial group is better suited than the village group for bringing under cultivation a country in which waste-lands are extensive So also does it seem to me likely to have been at all times more tolerant of agricultural novelties. It is a serious error to suppose that the non-feudal forms of property which characterised the cultivating communities had any real resemblance to the absolute property of our own day. The land was free only in the sense of being free from feudal services, but it was enslaved to custom. An intricate net of usage bound down the allodial owner, as it now binds the Indian peasant, to a fixed routine of cultivation. It can hardly be said that in England or Germany these usages had ceased to exercise a deadening influence even within living memory, since very recent writers in both countries complain of the bad agriculture, perpetuated by custom in the open common fields. The famous movement against Inclosures under the Tudor reigns was certainly in

part provoked by inclosures of plots in the three common fields made with the intention of breaking the custom and extending the systematic cultivation of grasses; and it is curious to find the witnesses examined before the Select Committee of 1844 using precisely the same language which was employed by the writers who in the sixteenth century took the unpopular side, and declaring that the value and produce of the intermixed lands might be very greatly increased if the owner, instead of having one plot in each field, had three plots thrown together in one field and dealt with them as he pleased. As I said before, it seems to me a plausible conjecture that our absolute form of property is really descended from the proprietorship of the lord in the domain which—besides planting it with the settlements of 'unfree' families—he tilled, when it was close to his castle or manor-house, by his own dependants under his own eye. He was free from the agricultural customs which shackled those below him, and the services exacted from above were not of a kind to affect his management of the land which he kept in his hands. The English settlers on the New England coast did not, as I shall point out, at first adopt this form of property, but they did so very shortly, and we unquestionably owe to it such an achievement as the cultivation of the soil of North America.

If, however, a society organised in groups on the

primitive model is ineffective for Production, so also if left to develop itself solely under primitive influences it fails to secure any considerable improvement in Distribution. Although it is hardly possible to avoid speaking of the Western village groups as in one stage democratically governed, they were really oligarchies, as the Eastern communities always tend to become. These little societies had doubtless anciently a power of absorption, when men were of more value than land. But this they lose in time. There is plenty of evidence that, when Western Europe was undergoing feudalisation, it was full of enthralled classes; and I imagine that the authority acquired by the feudal chief over the waste was much more of an advantage than the contrary to these classes, whom he planted largely there in colonies which have probably been sometimes mistaken for assemblages of originally free villagers. The status of the slave is always deplorable; the status of the predial slave is often worse than that of the personal or household slave; but the lowest depth of miserable subjection is reached when the person enthralled to the land is at the mercy of peasants, whether they exercise their powers singly or in communities.

Whether the Indian village-communities had wholly lost their capacity for the absorption of strangers when the British dominion began, is a

point on which I have heard several contradictory opinions; but it is beyond doubt that the influence of the British Government, which in this respect is nothing more than the ordinary influence of settled authority, has tended steadily to turn the communities into close corporations. The definition of rights which it has effected through its various judicial agencies—the process of law by which it punishes violations of right—above all the money value which it has given to all rights by the security which it has established from one end of India to another—have all helped to make the classes in possession of vested rights cling to them with daily increasing tenacity. To a certain small extent this indirect and unintended process of shutting the door to the acquisition of new communal rights has been counteracted by a rough rule introduced by the English, and lately engrafted on the written law, under which the cultivator of the soil who has been in possession of it for a period of years is in some parts of India protected against a few of the extreme powers which attach to ownership of the modern English type. But the rule is now in some discredit, and the sphere of its operation has of late been much curtailed. And my own opinion (which I shall state more at length in the next Lecture) is, that even if the utmost effect were given to it, it would not make up for some of the inequalities of distribution between

classes actually included in the village group which have made their way into it through the influence of economical ideas originating in the West. On the whole the conclusion which I have arrived at concerning the village-communities is that, during the primitive struggle for existence they were expansive and elastic bodies, and these properties may be perpetuated in them for any time by bad government. But tolerably good government takes away their absorptive power by its indirect effects, and can only restore it by direct interposition.

It was part of my design to append to these Lectures an epitome of the work in which Professor Nasse has attempted to connect the actual condition of landed property in much of England at the end of the last century as shown in the various publications of Marshall, with the early English forms of tenure and cultivation as known to us through the labours of English and German scholars. But I have abandoned my intention on learning that Nasse's book is likely to be made generally accessible through an English translation. The undertaking is one which presents considerable difficulties. Nasse complains of the unusual scarcity of English records bearing on tenure and agricultural custom, but in this place we may note another class of difficulties having its source in those abundant technicalities of English real-property law which are so hard to read by any-

body except the professional lawyer; and yet another in the historical theory of their land law which almost all English lawyers have adopted, and which colours all English treatises and all the decisions of English Courts—a theory which, it is not unjust to say, practically regards the manorial system as having no ascertainable antecedents, and all rights *primâ facie* inconsistent with it as having established themselves through prescription and by the sufferance of the lord. I may be allowed to say that the book in which Nasse has knotted together the two ends of the historical thread is a very extraordinary one to be written by a foreigner. Much of it deals with matter which can only be discussed appropriately in other departments of study; but I may notice in this place one set of causes, of a purely juridical nature, which, besides those assigned by Nasse, tended in later times to throw small or yeomen properties into the hands of large landowners. The popular opinion much exaggerates the extent to which this accumulation of landed properties had proceeded before the great inclosures of the last century, but still it had gone some length, and undoubtedly one cause was the influence, not at first strongly felt, of the Statute of Devises. Each landed proprietor ultimately acquired the power—within limits certainly, but very wide ones—to create a private law for his own estate. The efforts of English judges to introduce order into

this chaos made it rather worse; for the expedient which they adopted for the purpose was to give a forced technical meaning to the popular language of testators. One large and complex branch of English law is still concerned with the rules for construing in a technical sense the loose popular expressions found in wills. Every estate, willed away by a testator technically unlearned, was in danger of being burdened with a mass of conflicting rights and interests, for the most part never contemplated by the testator himself. There was only one way of insuring oneself against this consequence, and that was the employment of an expert to make the will; but there is reason to believe that the wholesale employment of legal experts which is now one of the singularities of this country is of comparatively modern date, since it is one of the traditions of the English Bar, derived from the last generation of lawyers, that among the great sources of litigation were at one time wills made by village schoolmasters. Estates thus burdened could only be held by very rich men; as they alone could provide and insure against the technical traps which abounded in the private law under which the land was held, or could render them innocuous by continued possession ending in a prescriptive title. It is impossible not to see that the practice of unshackled devise tended to bring small estates into the market as unprofitable to the holders through the

complication of interests in them, and at the same time tended to make them purchaseable by rich men only.

The simple truth is that, if a system of small or peasant holdings is to continue, the power of testators must be severely restrained in order to produce simplicity in the law of the estate. It does not at all follow that the restrictions must be those of the Code Napoleon; but restrictions there must be, and I venture to think that a not unsatisfactory solution of the problem is to be found in the law by which the Indian Government has recently sought to control the power of will-making, which the early English judges either introduced into India or invested with proportions which had never belonged to it before.

LECTURE VI.

THE EARLY HISTORY OF PRICE AND RENT.

CONTENTS.

Structure of Village-Communities—Divisions of the Community—Property within the Community—Tradition as to Rights—Exactions of Indian Sovereigns—Indian Rent—Difficulty of Question—Anglo-Indian Ideas—Customary and Competition Rents—The Protected Tenants—Indian and English Forms of Property—True Character of Problem—The Irish Clan—Rack-Rent paid by Strangers—Primitive Notion as to Price—Early Measure of Price—Basis of Political Economy—The Market—Markets and Neutrality—Influence of Market Law—Sentiments Adverse to Political Economy—Primitive Commercial Principles—Influence of Carrying Trade—Price and Rent—Market for Land in England—New Information Required—Village-Communities in America.

LECTURE VI.

THE EARLY HISTORY OF PRICE AND RENT.

The village-communities which are still found in the Eastern world, exhibit, at first sight, a much simpler structure than appears on close examination. At the outset they seem to be associations of kinsmen, united by the assumption (doubtless, very vaguely conceived) of a common lineage. Sometimes the community is unconnected with any exterior body, save by the shadowy bond of caste. Sometimes it acknowledges itself to belong to a larger group or clan. But in all cases the community is so organised as to be complete in itself. The end for which it exists is the tillage of the soil, and it contains within itself the means of following its occupation without help from outside. The brotherhood, besides the cultivating families who form the major part of the group, comprises families hereditarily engaged in the humble arts which furnish the little society with articles of use and comfort. It includes a village watch and a village police, and there are organised authorities for

the settlement of disputes and the maintenance of civil order.

But, when the Indian village-communities are more carefully scrutinised, a more complex structure discloses itself. I told you that some dominant family occasionally claims a superiority over the whole brotherhood, and even over a number of separate villages, especially when the villagers form part of a larger aggregate, tribe or clan. But, besides this, the community itself is found, on close observation, to exhibit divisions which run through its internal framework. Sometimes men of widely different castes, or Mahometans and Hindoos, are found united in the same village group; but in such cases its artificial structure is not disguised, and the sections of the community dwell in different parts of the inhabited area. But the most interesting division of the community—though the one which creates most practical difficulty—may be described as a division into several parallel social strata. There are, first, a certain number of families who are traditionally said to be descended from the founder of the village; and I may here repeat a statement made to me that the agricultural traditions of India, differing in this from the heroic traditions which furnish a subject to the great Sanscrit poems, imply that the occupation of the rich Indian plains was a process rather of colonisation than of conquest. Below these families, descended from

the originators of the colony, there are others, distributed into well ascertained groups. The brotherhood, in fact, forms a sort of hierarchy, the degrees of which are determined by the order in which the various sets of families were amalgamated with the community. The tradition is clear enough as to the succession of the groups and is probably the representation of a fact. But the length of the intervals of time between each successive amalgamation, which is also sometimes given and which is always enormous, may be safely regarded as untrustworthy; and, indeed, numbers count for nothing in the East.

The relations of these component sections to one another have furnished Eastern statesmen with the problem which, of all others, has perplexed them most. For it has been necessary to translate them into proprietary relations. The superiority of each group in the hierarchy to those below it bears undoubtedly some analogy to superiority of ownership in the land which all alike cultivate. But the question has been, What is the superiority to carry with it when translated into a higher right of property? What division is it to imply of the total produce of the village domain? What power is it to confer of dealing with the land itself? A law of tenure and tenancy had in fact to be constructed, not only outside but inside the cultivating group.

It is easy to see that these questions were not of the kind on which traditions were likely to throw any considerable light. For traditions, as I before stated, though tenaciously preserved by organised primitive societies, are only thoroughly to be depended upon when there have been acts and practices corresponding to them. It is extremely likely that the traditional respect of each group of families within the community for those above it did occasionally take some concrete form, but it is in the highest degree improbable that the various layers of the little society were connected by anything like the systematic payment of rent. For what is it which in primitive states of society forces groups of men to submit to that amalgamation of strangers with the brotherhood which seems at first forbidden by its very constitution ? It is the urgency of the struggle for existence—a struggle in the West probably both with man and with nature—in the East a struggle less with savage enemies than with nature, not indeed unkindly, but extraordinarily capricious, and difficult to subdue from her very exuberance. The utmost available supply of human labour at first merely extracts from the soil what is sufficient for the subsistence of the cultivating group, and thus it is the extreme value of new labour which condones the foreign origin of the new hands which bring it. No doubt there comes a time when this process ceases, when the fictions which conceal it seem

to die out, and when the village-community becomes a close corporation. As soon as this point is reached there is no doubt that any new-comers would only be admitted on terms of paying money or rendering service for the use and occupation of land. But in India, at all events, another set of influences then came into play which have had the effect of making the vestiges of the payment of rent extremely faint and feeble. All Oriental sovereigns feed their courts and armies by an unusually large share of the produce of the soil which their subjects till. The Indian monarchs of whose practices we have any real knowledge took so much of the produce in the shape of land-revenue as to leave to the cultivating groups little more than the means of bare subsistence. There is no discernible difference in this respect between the Mahometan Emperors of Delhi, the Mahratta princes who were dividing the Mogul Empire between them when the English first appeared, or the still more modern Hindoo sectaries, called the Sikhs, from whom we conquered the Punjab. Such nobility as existed was supported not by rents but by assignments of the royal revenue ; and the natural aristocracy of the country would have differed in little from the humbler classes but for these assignments, or for the money which stuck to their fingers as the tax-gatherers of the king. The fund out of which rent is provided is in fact a British creation—the fruit of the peace

which the British have kept and of the moderation of their fiscal demands.

It is sometimes said, in connection with this subject, that the idea of property in land is realised with extreme distinctness by the natives of India. The assertion is true, but has not the importance which it at first appears to possess. Between village-community and village-community, between total group and total group, the notion of an exclusive right to the domain is doubtless always present; and there are many striking stories current respecting the tenacity with which expelled communities preserve traditions of their ancient seat. But to convince himself that, as regards the interior of the group, the notion of dependent tenures connecting one stratum with another is very imperfectly conceived, it is only necessary for an impartial person to read or listen to the contradictory statements made by keen observers of equal good faith. The problem of Indian Rent cannot be doubted to be one of great intrinsic difficulty. To see this, it need only be stated. The question is not one as to a custom, in the true sense of the word; the fund out of which rent comes has not hitherto existed or has barely existed, and hence it has not been asserted on either side of the dispute that rent (as distinct from the Government revenue) was paid for the use or occupation of land before the establishment of the British Empire, or that, if it was

paid, it bore any relation to the competition value of cultivable soil. Nor was it an enquiry as to a tradition, because the further you recede from the beginning of British rule the greater is your distance from the conditions under which the exaction of competition-rent for land becomes conceivable. The true problem can only be stated by making an assumption contrary to the fact. Assume a market for land and assume the existence of the fund out of which rent comes—what primitive ideas can be traced which point to the distribution of the fund in any particular way ? Such is the question. It is on the whole, I think, to be regretted that the British Government allowed its servants to embark on such an enquiry. However desirable it may be to govern the natives of the country in harmony with their own ideas, the effect of attempting to grapple with a problem under such vague conditions has led to violent recoils of opinion and practice on a matter in which settled policy was pre-eminently counselled by justice and prudence ; and in this case it would have been better, I think, to abandon the historical mode of dealing with a practical question peculiar to the Indian government, to choose the social and economical principles on which it was intended to act, and to adhere to them until their political unsoundness was established. But to the student of legal history the question is one of very considerable interest, and, how-

ever little suited it may be for the Council chamber, it may very excusably be handled in this place.

When first, amid the general discredit of the experiment tried by Lord Cornwallis in Bengal Proper, the Indian administrators of fifty or sixty years since began to recognise the village-community as the true proprietary unit of the country, they had very soon to face the problem of rent. They in some cases recognised an ownership superior to that of the village itself; though it is alleged by their critics that they did not recognise it as much as they ought to have done. Within the village-community they in all cases recognised a hierarchy of minor groups, distinguished in some way by the difference of their rights in the soil. Besides their observation of Indian phenomena, which was here (as I have explained) conducted under extraordinary difficulties, they had nothing to guide them to a conclusion except the English forms of property in land; and they probably accepted unreservedly from the lawyers of that day the belief that the system actually obtaining in England was not only the ancient system of the country but that it was semi-sacred. A further misleading influence was the phraseology already introduced by the Economists. Between customary rents and competition-rents they did not fail to distinguish, and would probably not have denied that, as a matter of fact, customary rents were more common and, as a matter

of recorded history, were more ancient than competition-rents. But still, misled by an error which has of late been very justly compared with a still more famous delusion of the Roman lawyers (by Mr. Cliffe Leslie, 'Fortnightly Review,' November 1870), they believed competition-rents to be, in some sense or other, more natural than customary rents, and to competition-rents only they gave the name Rent, unqualified by an epithet. This peculiar and (as it seems to me) improper selection of a cardinal term is not probably of much importance in this country; but few sufficiently instructed persons, who have followed recent Indian controversies, can have failed to observe that almost all the obscurities of mental apprehension which are implied in the use of Nature as a juridical term cluster in India round the word, Rent. Still there was too much around the earliest Anglo-Indian observers which seemed inconsistent with (to say the least) the universal occurrence in India of the English relation between landlord and tenant-at-will for them to assume unhesitatingly that the absolute ownership of the soil was vested in some one class, and that the rest of the cultivating community were simply connected with the proprietary class by paying for the use of the land whatever the members of that class saw fit to demand. They did assume that the persons who were acknowledged to be entitled to have the highest rights in the soil, whether within the community or without

it, bore a very close analogy to English landowners in fee simple. They further took for granted that the great mass of the cultivators were tenants-at-will of the English pattern. But they gave effect to their doubts of the correctness of these analogies by creating between landowner and tenant-at-will an intermediate class of protected, or, as they are called in the East, 'occupancy' tenants. When, under the government dispossessed by the British, any cultivator was shown to have held his land by himself or his ancestors for a certain space of time, he was declared to be entitled to a qualified protection against eviction and rack-rent. By a recent legislative enactment this principle has been generalised, and any cultivator who even under the British Government has been undisturbed by his landlord for the like period is invested, in some parts of India, with the same protection. But at first the rule, of which the origin is uncertain, was probably intended as a rough way of determining a class which in some sense or other was included within the village-community. The exact period of occupation selected was twelve years; the longest time during which it seems to have been thought safe to carry back into native society an enquiry upon legal evidence into a question of fact.

On this rule the most vehement of controversies has arisen. It is strongly asserted by a school of observation and theory which has many adherents in the

present day that close examination of village-communities does not show that mere lapse of time conferred any rights on one section of the group as against another. In Indian disputes, as in many others, the advantage is at first with destructive criticism, and, upon the evidence which I have seen, I am on the whole disposed to think that the school of which I am speaking is in the right. The errors into which it has fallen appear to me to begin at a subsequent point. Some of its adherents seem to think that a certain correspondence being assumed to exist between a certain Indian class and owners of land in England, and a certain correspondence being further assumed between another Indian class and English tenants, the inference inevitably follows that the correspondence must be so close as to imply all the incidents of the English relation of landlord and tenant-at-will. But the Indian forms of property in land are founded on the Village Group as the proprietary unit; the English forms are based partly on the Manorial Group and partly on a state of things produced by its disintegration — systems historically so wide apart can hardly be used even to illustrate one another. There are other adherents of the same opinion who, conscious perhaps of the true difficulty, attempt to get over it by asking the peasants belonging to the village-community what their customs are as to eviction, rack-rent, and the relation of landlord

and tenant. Now, if there were the faintest reason for supposing that there ever existed in India an open market for land and a system of competition-rents, such an enquiry would be of great importance, for unquestionably cultivating village groups are highly retentive of tradition. But, eviction being admitted to have been rarely (if ever) practised, and it being allowed that rent was never paid for the use of land or (if paid) was not paid on any scale which indicated its principle, to ask a peasant whether a given class of tenants ought or ought not to be subject to rack-rent and eviction is to put to a very ignorant man a question at once extremely complex, extremely ambiguous, and only capable of being answered (so far as it can be answered at all) after a careful examination of the parallel phenomena of many different ancient systems of law. The reference to the peasantry is doubtless honestly made, but it is an appeal to the least competent of tribunals.

The question, What vestiges remain of ancient ideas as to the circumstances under which the highest obtainable rent should be demanded for the use of land, is of some interest to the student of legal antiquities; although even in this place it is not a question which can be very confidently answered. The most distinct ancient rule which I have discovered occurs in the first of the official volumes containing the version of the Ancient Laws of Ireland published by the Irish

Government. 'The three rents,' it says, 'are rack-rent, from a person of a strange tribe—a fair rent, from one of the tribe—and the stipulated rent, which is paid equally by the tribe and the strange tribe.' (Senchus Mor, p. 159.)

This very much expresses the conclusion on the subject which I have arrived at upon the less direct evidence derived from a variety of quarters. The Irish clan was apparently a group much more extensive and of much looser structure than the Eastern or Western village-community; it appears even to have embraced persons who cannot be distinguished from slaves. Yet from none of these (apart from express agreement) could any rent be required but a rent fair according to received ideas, or, in other words, a customary rent. It was only when a person totally unconnected with the clan by any of those fictions explaining its miscellaneous composition which were doubtless adopted by this (as by all other) primitive groups—when such a person came asking for leave to occupy land, that the best bargain could be made with him to which he could be got to submit. 'Rack-rent' is sometimes used as a dyslogistic expression for an extreme competition-rent; but you will see that ideas associated with competition-rents in the economical sense have no relation whatever to such a transaction. In a primitive society the person who submits to extreme terms from one group is

pretty sure to be an outcast thrown on the world by the breaking up and dispersion of some other group, and the effect of giving him land on these terms is not to bring him under the description of a tenant as understood by the Economists, but to reduce him to a condition resembling predial servitude. I need hardly add that, in stating what seem to me the circumstances under which a rack-rent could be demanded according to primitive ideas, I am merely drawing an antiquarian inference, and expressing no opinion whatever on the political expediency or otherwise of limiting the claim of a landlord to rent.

The enquiry into these primitive ideas may also be conducted by another route, which I will follow for a brief space on account of some curious collateral questions which it opens. Let me begin by saying that the remains of ancient Roman law forcibly suggest that in ancient times transfers of the possession of land were extremely rare. The formalities which accompanied them were of extraordinary cumbrousness, and these formalities had to be strictly observed not only in transactions which we should call Conveyances, but also in the transactions which at a later date were styled Contracts. The ancient law further gives reason to think that the letting and hiring of movable property for a consideration was unknown or uncommon. The oldest Roman contracts systematically treated of are the Real Contracts, and

to this class belongs Loan; but the loans there spoken of are gratuitous, and the rules laid down grew probably out of the practice of lending from house to house the small articles of movable property in use among a primitive people. There is some interest in observing the plentifulness of these rules in a system so comparatively mature as Roman law when contrasted with their scantiness in English jurisprudence. The explanation seems to be that the abundant manufacture nowadays of all articles of personal property causes them to be much oftener owned than lent, so that minute rules on the subject of gratuitous loans become superfluous.

It would almost certainly be labour wasted to search among the records of ancient law for any trace of the ideas which we associate with competition-rents. But if land in primitive times was very rarely sold or (in our sense) rented, and if movable property was very rarely hired for money, it is at least probable that from a very early date movables were purchased. It does not appear to me quite a hopeless undertaking to trace the gradual development of the notions connected with Price; and here, if at all, we shall be able to follow the early history of bargaining or competition. Nor, if we can discover any primitive ideas on the point, need we hesitate to transfer them from the sale of movables to the competition-rent of land. The Roman lawyers remark

of the two contracts called Emptio Venditio, or Sale for Price, and Locatio Conductio, or Hiring for Consideration, that they are substantially the same, and that the rules which govern one may be applied to the other. The observation seems to me not only true, but one which it is important to keep in mind. You cannot indeed without forcing language speak of the Contract of Sale in terms of the Contract of Letting and Hiring; but the converse is easy, and there is no incorrectness in speaking of the Letting and Hiring of Land as a Sale for a period of time, with the price spread over that period. I must confess I could wish that in some famous books this simple truth had been kept in view. It has several times occurred to me, in reading treatises on Political Economy, that if the writer had always recollected that a competition-rent is after all nothing but price payable by instalments, much unnecessarily mysterious language might have been spared and some (to say the least) doubtful theories as to the origin of rent might have been avoided. The value of this impression anybody can verify for himself.

What, in a primitive society, is the measure of Price? It can only be called Custom. Although in the East influences destructive of the primitive notion are actively at work, yet in the more retired villages the artificer who plies an ancient trade still sells his wares for the customary prices, and would always

change their quality rather than their price—a preference, I must remark, which has now and then exposed the natives of India to imputations of fraud not wholly deserved. And in the West, even in our own country, there are traces of the same strong feeling that price should be determined by Custom in the long series of royal, parliamentary, and municipal attempts to fix prices by tariff. Such attempts are justly condemned as false political economy, but it is sometimes forgotten that false political economy may be very instructive history.

What, then, is the origin of the proposition on which the whole of the great deductive science of Political Economy is based? No good political economist asserts that, as matter of fact, everybody asks for his saleable commodities the highest obtainable price; still less does he assert that everybody ought to ask it. What he lays down is that the practice of asking it is sufficiently general to make it safe for practical purposes to treat it as universal. When, however, we are discussing the ideas of very primitive societies, it is extremely difficult to draw the line between law, morality, and fact. It is of the very essence of Custom, and this indeed chiefly explains its strength, that men do not clearly distinguish between their actions and their duties—what they ought to do is what they always have done, and they do it.

What, then, is the origin of the rule that a man

may ask—or, if you choose so to put it, that he does ask—the highest available price for the wares which he has to sell? I think that it is in the beginning a Rule of the Market, and that it has come to prevail in proportion to the spread of ideas originating in the Market. This indeed would be a proposition of little value, if I did not go farther. You are well aware that the fundamental proposition of Political Economy is often put as the rule of buying in the cheapest market and selling in the dearest. But since the primitive period the character of markets has changed almost as much as that of society itself. In order to understand what a market originally was, you must try to picture to yourselves a territory occupied by village-communities, self-acting and as yet autonomous, each cultivating its arable land in the middle of its waste, and each, I fear I must add, at perpetual war with its neighbour. But at several points, points probably where the domains of two or three villages converged, there appear to have been spaces of what we should now call neutral ground. These were the Markets. They were probably the only places at which the members of the different primitive groups met for any purpose except warfare, and the persons who came to them were doubtless at first persons specially empowered to exchange the produce and manufactures of one little village-community for those of another. Sir John Lubbock in his recent

volume on the 'Origin of Civilisation,' has some interesting remarks on the traces which remain of the very ancient association between Markets and Neutrality (p. 205); nor—though I have not now an opportunity of following up the train of thought—can I help observing that there is an historical connection of the utmost importance to the moderns between the two, since the Jus Gentium of the Roman Prætor, which was in part originally a Market Law, is the undoubted parent of our International Law. But, besides the notion of neutrality, another idea was anciently associated with markets. This was the idea of sharp practice and hard bargaining. The three ideas seem all blended in the attributes of the god Hermes or Mercury—at once the god of boundaries, the prince of messengers or ambassadors, and the patron of trade, of cheating, and of thieves.

The Market was then the space of neutral ground in which, under the ancient constitution of society, the members of the different autonomous proprietary groups met in safety and bought and sold unshackled by customary rule. Here, it seems to me, the notion of a man's right to get the best price for his wares took its rise, and hence it spread over the world. Market Law, I should here observe, has had a great fortune in legal history. The Jus Gentium of the Romans, though doubtless intended

in part to adjust the relations of Roman citizens to a subject population, grew also in part out of commercial exigencies, and the Roman Jus Gentium was gradually sublimated into a moral theory which, among theories not laying claim to religious sanction, had no rival in the world till the ethical doctrines of Bentham made their appearance. If, however, I could venture to detain you with a discussion on technical law, I could easily prove that Market Law has long exercised and still exercises a dissolving and transforming influence over the very class of rules which are profoundly modifying the more rigid and archaic branches of jurisprudence. The Law of Personal or Moveable Property tends to absorb the Law of Land or of Immoveable Property, but the Law of Moveable Property tends steadily to assimilate itself to the Law of the Market. The wish to establish as law that which is commercially expedient is plainly visible in the recent decisions of English courts of justice; a whole group of legal maxims having their origin in the law of the market (of which the rule of *caveat emptor* is the most significant) are growing at the expense of all others which compete with them; and there is a steady tendency in English legislation to engraft new rules, as from time to time they are developed by traders, upon the commercial law of England. Finally, the most recent of Indian disputes is whether native opinion admits of including in the Civil Code of the country the rule that a man who in good faith

has purchased goods of another shall have them, though the seller had really no title to them and though the owner claim them. This is in reality an extreme rule of Market Law, and it is often described in fact as the rule of Market Overt, since it only obtains in England where that description of market exists.

Political Economists often complain of the vague moral sentiments which obstruct the complete reception of their principles. It seems to me that the half-conscious repulsions which men feel to doctrines which they do not deny might often be examined with more profit than is usually supposed. They will sometimes be found to be the reflection of an older order of ideas. Much of moral opinion is no doubt in advance of law, for it is the fruit of religious or philosophical theories having a different origin from law and not yet incorporated with it. But a good deal of it seems to me to preserve rules of conduct which, though expelled from law, linger in sentiment or practice. The repeal of the Usury Laws has made it lawful to take any rate of interest for money, yet the taking of usurious interest is not thought to be respectable, and our Courts of Equity have evidently great difficulty in bringing themselves to a complete recognition of the new principle. Bearing this example in mind, you may not think it an idle question if I ask, What is the real origin of the feeling that it is not creditable to drive a hard bargain with a near

relative or a friend? It can hardly be said that there is any rule of morality to forbid it. The feeling seems to me to bear the traces of the old notion that men united in natural groups do not deal with one another on principles of trade. The only natural group in which men are now joined is the family; and the only bond of union resembling that of the family is that which men create for themselves by friendship. It is stated that there is the strongest repulsion among the natives of India to that extreme rule of Market Law which I described to you as proposed to be engrafted on the Civil Code. The point is doubtful on the evidence, but, considering the prevalence and vitality of organised natural groups in India, the *à priori* presumption is certainly in favour of the existence of the alleged repugnance.

All indications seem to me therefore to point to the same conclusion. Men united in those groups out of which modern society has grown do not trade together on what I may call for shortness commercial principles. The general proposition which is the basis of Political Economy, made its first approach to truth under the only circumstances which admitted of men meeting at arm's length, not as members of the same group, but as strangers. Gradually the assumption of the right to get the best price has penetrated into the interior of these groups, but it is never completely received so long as the bond of connection between

man and man is assumed to be that of family or clan-connection. The rule only triumphs when the primitive community is in ruins. What are the causes which have generalised a Rule of the Market until it has been supposed to express an original and fundamental tendency of human nature, it is impossible to state fully, so multifarious have they been. Everything which has helped to convert society into a collection of individuals from being an assemblage of families, has helped to add to the truth of the assertion made of human nature by the Political Economists. One cause may be assigned, after observation of the East, in the substitution of caravan or carrying trade for the frequentation of markets. When the first system grows up, the merchant, often to some extent invested with the privileges of an ambassador, carries his goods from the place of production, stores them in local entrepôts, and sells them on the principles of the Market. You will here call to mind the curious fact, stated to me on high authority, that the Grain-Dealer, though a man of great consequence and wealth, is often excluded in India from village or municipal privileges to which the small tradesmen whose business is an ancient appendage of the community are freely admitted. I am also informed that the natives of India will often pay willingly a competition price for one article, when they would think it unjust to be asked more than a customary price for another. A

man who will pay the price of the day for corn collected from all parts of India, or for cotton-cloth from England, will complain (so I am told) if he is asked an unaccustomed price for a shoe.

If the notion of getting the best price for moveable property has only crept to reception by insensible steps, it is all but certain that the idea of taking the highest obtainable rent for land is relatively of very modern origin. The rent of land corresponds to the price of goods, but doubtless was infinitely slower in conforming to economical law, since the impression of a brotherhood in the ownership of land still survived when goods had long since become the subject of individual property. So strong is the presumption against the existence of competition-rents in a country peopled by village-communities that it would require the very clearest evidence to convince me that they were anywhere found under native conditions of society, but the evidence (as I told you) is remarkably unconvincing. I of course admit that certain classes of people are so slightly connected with the village-community that, under the new conditions introduced into India by the English, their rents would probably have become competition-rents. The problem, however, presented by these classes is not antiquarian but political. It is identical with that terrible problem of pauperism which began to press on English statesmen as soon

as the old English cultivating groups began distinctly to fall to pieces. In India the solution will be far more difficult than it has proved here, since the country has little mineral fuel and can have no manufactures on a scale to occupy a large surplus population; and emigration for the most part is regarded as mortal sin.

The right to take the highest obtainable rent for land is, as a matter of fact and as a matter of morality, a right derived from a rule of the market. Both the explanation and the justification of the exercise of the right in England and Scotland is that in these countries there really is a market for land. Yet it is notorious that, in England at all events, land is not universally rackrented. But where is it that the theoretical right is not exercised? It is substantially true that, where the manorial groups substituted for the old village groups survive, there are no rackrents. What is sometimes called the feudal feeling has much in common with the old feeling of brotherhood which forbade hard bargains, though like much else it has passed from the collective community to the modern representative of its autocratic chieftain. Even in England the archaic rules I have been describing have not yet quite lost their authority.

Here I conclude the Lectures of the Term. Their chief object, as I have repeatedly stated, has been to

establish a connection between the results of Indian experience and observation and the conclusions arrived at by German and English learning. But another purpose will have been served if some of those who have attended here are induced to help in adding to our knowledge of ancient English tenures. In spite of the information collected by the Select Committee of 1844, we know far too little of Common and Commonable fields, of Lammas lands, Common meadows, and limited rights over Wastes, and generally of manorial customs. Yet forms of property, savouring of the old collective enjoyment, seem to occur so frequently that almost anybody has the opportunity of collecting facts which may have an important bearing on our enquiry. The speculative interest of the subject I need scarcely enlarge upon, but these ancient joint-holdings have a farther interest as constituting not only some of the oldest, but some of the most lasting phenomena of English history. It is a striking remark of Nasse that the English common field system bears the marks of an exotic origin. In the time of the ruder agriculture which has now given way to scientific tillage, the natural fitness of the soil of England was for grass farming, and the tendency to resort to it as the most profitable form of cultivation was apparently irresistible, and out of it grew some very serious agrarian movements. The three-field system was therefore brought by our Teutonic ancestors from some drier

region of the Continent. It is a very remarkable fact that the earliest English emigrants to North America—who, you know, belonged principally to the class of yeomanry—organised themselves at first in village-communities for purposes of cultivation. When a town was organised, the process was that 'the General Court granted a tract of land to a company of persons. The land was first held by the company as property in common.' (Palfrey, 'History of New England,' ii. 13.) An American commentator on this passage adds: 'The company of proprietors proceeded to divide the land by assigning first house-lots (in Marlborough from fifteen to twenty acres), then tracts of meadow land, and in some cases mineral land, i.e. where bog-iron ore was found. Pasture and woodland remained in common as the property of the company, but a law of the General Court in 1660 provided that "hereafter no cottage or dwelling-house be admitted to the privilege of commonage for wood, timber, or herbage but such as are already in being, or shall be erected with the consent of the town." From that time the commoners appear as a kind of aristocracy, and the commons were gradually divided up.' This is not only a tolerably exact account of the ancient European and existing Indian village-community, but it is also a history of its natural development, where the causes which turn it into a manorial group are absent, and of its ultimate dissolution.

THE EFFECTS OF OBSERVATION OF INDIA ON MODERN EUROPEAN THOUGHT.

CONTENTS.

Dulness of Indian Topics—Continental Interest in India—Relation of India to England—Influence of Study of Sanscrit—Political Results of Oriental Studies—Materials for New Science in India—Isolation of India—Coast Populations—Character of the Interior—Actual Brahminical Religion—Effects of Brahminism on older Faiths—Deification of Force—Actual Character of Caste—The Comparative Method and Property—Theories of Property—Indian Forms of Property—Indian Discussions on Ownership—Value of Indian Phenomena—Early History of Property—Ancient Joint Ownership—Modern Origin of Competition—Exchangeableness of Land—Communistic Theories—Several Property and Civilisation—The Comparative Method and Custom—Benthamism—Political Economy—India and the Roman Empire—India and Judæa—British Government of India—Obstinacy of Native Prejudice—Hellenic Origin of Progress—English Influence in India.

THE EFFECTS OF OBSERVATION OF INDIA ON MODERN EUROPEAN THOUGHT.[1]

I AM WELL AWARE that, in undertaking to address an English audience on an Indian subject, I should under ordinary circumstances have to preface what I have to say with an apology ; but, speaking to you here, I believe it will be enough if I remind you that the proverbial dulness attributed to Indian topics by Englishmen, which (as they are apt frankly to allow) does not reflect any particular credit upon them, is as far as possible from being recognised by the learned class in any other community. No one can observe the course of modern thought and enquiry on the Continent, and especially in Germany, without seeing that India, so far from being regarded as the least attractive of subjects, is rather looked upon as the most exciting, as the freshest, as the fullest of new problems and of the promise of new discoveries. The fervor of enthusiasm which glows in the lines written by the greatest of German poets when the dramatic genius of the Hindoos first became

[1] (The Rede Lecture for 1875, delivered before the University of Cambridge.)

known to him through the translation of *Sakuntala*, seems to have scarcely abated in the scholars of our day who follow philological studies and devote themselves to the new branches of investigation constantly thrown out by the sciences of Comparative Philology and Comparative Mythology. Nor can one avoid seeing that their view of India affects in some degree their view of England; and that the community, which is stigmatised more systematically on the Continent than it is perhaps aware, as a nation of shopkeepers, is thought to have had a halo of romance spread around it by its great possession. Why India is on the whole so differently regarded among ourselves, it is not, I think, hard to understand. It is at once too far and too near. Morally and politically, it is very far from us indeed. There are doubtless writers and politicians who think they have mastered it with little trouble, and make it the subject of easy and shallow generalisations; but the thinker or scholar who approaches it in a serious spirit finds it pregnant with difficult questions, not to be disentangled without prodigious pains, not to be solved indeed unless the observer goes through a process at all times most distasteful to an Englishman, and (I will not say) reverses his accustomed political maxims, but revises them, and admits that they may be qualified under the influence of circumstance and time. On the other hand, India is in a sense near to us; all

that is superficial and commonplace in it is pretty well known. It has none of the interest of a country barely unveiled to geographers, of the valley of the Oxus or the basin of Lake Tanganyika. It is mixed up with the ordinary transactions of life, with the business of government, with debates in Parliament not too well attended, with the stock exchange, the cotton market, and the annual relief of regiments. Nor do I doubt that the cause of the evil reputation of India which extends most widely is the constant and frequent complaints, which almost everybody receives from relatives settled there, of the monotony of life which it entails upon Europeans. It is perhaps worth while observing that this feeling is a permanent and not unimportant phenomenon, and that other immigrants into India from colder countries, besides modern Englishmen, have spoken of the ennui caused to them by its ungenial climate and the featureless distances of its plains. The famous founder of the Mogul dynasty, the Emperor Baber, confesses it as frankly as a British subaltern might do, and speaks of India in words which, I fear, have been too frequently echoed mentally or on paper. 'Hindostan,' he states, after closing the history of his conquest, 'Hindostan is a country that has few pleasures to recommend it. The country and towns are extremely ugly. The people are not handsome. . . The chief excellency of Hindostan is that it is a very large

country, and that it has abundance of gold and silver.'

The fact that knowledge of India has deeply affected European thought in many ways already, needs (I presume) no demonstration. There are many here who could explain with more authority and fulness than I could, the degree in which the discovery of Sanscrit has influenced the whole science of language, and therefore the classical studies still holding their own in the University. It is probable that all moderately intelligent young men who pursued those studies in the not very remote time before Englishmen were familiarly acquainted with the structure raised by German scholars on the foundations laid by our countrymen Jones and Colebrooke, had some theory or other by which they attempted to connect the linguistic phenomena always before them; but on such theories they can only now look back with amazement. To those again who can remember the original publication of Mr. Grote's History, and can recall the impression made upon them by his discussion of the real relation which Greek fable bore to Greek thought, it is most interesting to reflect that almost at the same moment another fruit of the discovery of Sanscrit was attaining to maturity, and the remarkable science of Comparative Mythology was taking form. There are other results, not indeed of knowledge of Indian lan-

guage, but of knowledge of Indian facts and phenomena, which are not yet fully realised; and these will be the principal subject of this Lecture. In the meantime, before we quit the subject of language, let me say that Sanscritic study has been the source of certain indirect effects, not indeed having much pretension to scientific character, but of prodigious practical importance. There is no question of its having produced very serious political consequences, and this is a remarkable illustration of the fact that no great addition can be made to the stock of human thought without profoundly disturbing the whole mass and moving it in the most unexpected directions. For the new theory of Language has unquestionably produced a new theory of Race. The assumption, it is true, that affinities between the tongues spoken by a number of communities are conclusive evidence of their common lineage, is one which no scholar would accept without considerable qualification; but this assumption has been widely made, and in quarters and among classes where the discoveries out of which it grew are very imperfectly appreciated and understood. There seems to me no doubt that modern philology has suggested a grouping of peoples quite unlike anything that had been thought of before. If you examine the bases proposed for common nationality before the new knowledge growing out of the study of Sanscrit had been popularised in Europe, you

will find them extremely unlike those which are now advocated, and even passionately advocated, in parts of the Continent. For the most part the older bases theoretically suggested were common history, common prolonged subjection to the same sovereign, common civilisation, common institutions, common religion, sometimes a common language, but then a common vernacular language. That peoples not necessarily understanding one another's tongue should be grouped together politically on the ground of linguistic affinities assumed to prove community of descent, is quite a new idea. Nevertheless, we owe to it, at all events in part, the vast development of German nationality; and we certainly owe to it the pretensions of the Russian Empire to at least a presidency over all Sclavonic communities. The theory is perhaps stretched to the point at which it is nearest breaking when men, and particularly Frenchmen, speak of the Latin race.

India has given to the world Comparative Philology and Comparative Mythology; it may yet give us a new science not less valuable than the sciences of language and of folk-lore. I hesitate to call it Comparative Jurisprudence because, if it ever exists, its area will be so much wider than the field of law. For India not only contains (or to speak more accurately, did contain) an Aryan language older than any other descendant of the common mother-tongue,

and a variety of names of natural objects less perfectly crystallised than elsewhere into fabulous personages, but it includes a whole world of Aryan institutions, Aryan customs, Aryan laws, Aryan ideas, Aryan beliefs, in a far earlier stage of growth and development than any which survive beyond its borders. There are undoubtedly in it the materials for a new science, possibly including many branches. To create it indeed, to give it more than a beginning, will require many volumes to be written and many workers to lend their aid. It is because I am not without hope that some of these workers will be found here that I now proceed to show, not, indeed, that the attempt to produce such a science will succeed, but that the undertaking is conceivable and practicable.

But first let me try to give some sort of answer to the question which probably has occurred to many minds—why is it that all things Aryan, the chief part of the heritage of the greatest of races, are older in India than elsewhere? The chief secret, a very simple one, lies probably in the extreme isolation of the country until it was opened by maritime adventure. Approached not by sea but by land, there is no portion of the earth into which it is harder to penetrate. Shut in by the Himalayas and their offshoots, it lies like a world apart. The great roads between Western and Eastern Asia probably lay

always to the north, as they did in the time of Marco Polo, connecting what once was and what still is the seat of a great industrial community—Asia Minor and China. The India of Herodotus is obviously on the hither side or in the close vicinity of the Indus; the sand of the great Indian desert which lies on the other bank was believed to extend to the end of the world. Megasthenes (*Strabo*, xv. 1. 6) cautioned his readers against believing stories concerning the ancient history of the Indians, because they had never been conquered. The truth is that all immigrations into India after the original Aryan immigration, and all conquest before the English conquest, including not only that of Alexander, but those of the Mussulmans, affected the people far more superficially than is assumed in current opinions. The true knowledge of India began with the era of distant navigation, and even down to our fathers' day it was extraordinarily slight. Even when maritime adventure did reveal something of the country, it was only the coast populations which were in any degree known. It is worth while pausing to remark that these coast populations have very materially contributed, and still contribute, to form the ordinary European view of India. The French philosophical writers of the last century, whose opinions at one time exercised directly, and still exercise indirectly, considerable influence over the fortunes of mankind, were accustomed to theorise largely about

the East; but, though they had obtained some knowledge of China from the narratives of missionaries, they obviously knew nothing about any part of India except the coast. The 'Histoire Philosophique des Indes,' a lengthy work of the Abbé Raynal and Diderot which is said to have done more than any other book to diffuse those notions about the constitution of human society which had vast effect on the course of the first French Revolution, is little more, so far as it relates to India, than a superficial account of European dealings with the populations of the coast; a little way inland the writers profess to have found communities living in a state of nature and innocence. There were of course Englishmen at the end of the eighteenth century who knew India a great deal better than Raynal and Diderot; but there is a good instance of the common limitation of English ideas about India to its coast in a work which was famous in our own day. Mr. Buckle, in the General Introduction to his 'History of Civilisation,' has derived all the distinctive institutions of India and the peculiarities of its people from their consumption of rice. From the fact, he tells us, that the exclusive food of the natives of India is of an oxygenous rather than a carbonaceous character, it follows by an inevitable law that caste prevails, that oppression is rife, that rents are high, and that custom and law are stereotyped. The passage ought to be a caution

against overbold generalisation; for it unfortunately happens that the ordinary food of the people of India is not rice. It is a product of the coast, growing in the deltas of great rivers, and only at one point of the country extending any distance inland. And there is another product of the coast of India which furnishes some of the best intentioned of our countrymen with materials for a rather hasty generalisation as to India as a whole. For it is in the cities of the coast and their neighbourhood that there has sprung up, under English influence, a thirst for knowledge, a body of opinions, and a standard of taste, which are wholly new in India. There you may see universities thronged like the European schools of the later middle age. There you may observe an eagerness in the study of Western literature and science not very unlike the enthusiasm of European scholars at the revival of letters. From this part of India come those most interesting samples of the native race who from time to time visit this country; but they are a growth of the coast, and there could be no greater mistake than to generalise from them as to the millions upon millions of men who fill the vast interior mass of India.

If passing beyond the fringe of British civilisation which is found at certain points of the Indian coasts, you enter this great interior block, you find that the ideas which it suggests are very different

indeed from those current about India even in this country. Such ideas have little in common with the apparent belief of some educated persons here that Indians require nothing but School Boards and Normal Schools to turn them into Englishmen, and very much less in common with the brutal assumption of the English vulgar that there is little to choose between the Indian and the negro. No doubt the social state there to be observed can only be called Barbarism, if we could only get rid of unfavourable associations with the word; but it is the barbarism either of the very family of mankind to which we belong, or of races which have accepted its chief and most characteristic institutions. It is a barbarism which contains a great part of our own civilisation, with its elements as yet inseparate and not yet unfolded. All this interior India has been most carefully observed and described by English functionaries from the administrative point of view, and their descriptions of it are included in hundreds of reports, but a more accessible and popular account of the state of idea, belief, and practice at the very centre of this great group of countries may be read in a series of most instructive papers lately published by Mr. Lyall, a gentleman now high in Indian office. (See NOTE A.) The province he describes, Berar, is specially well situated for such observations, for, though relieved from internal disturbance, it has been

as yet very imperfectly brought under British influences, being only held by the British Government in deposit from the great Mahometan prince of the South, the Nizam. There is no doubt that this is the real India, its barbarism (if I must use the word) imperceptibly giving way in the British territories until it ends at the coast in a dissolution amid which something like a likeness of our own civilisation may be discerned.

I spoke of the comparative preservation of primitive custom and idea in India as explicable in part through the geographical position of the country. But no reader of Mr. Lyall's papers can doubt that another powerful preservative has been the influence of Religion and Caste, an influence, however, of which I must warn my hearers that they will gain no accurate conception from the impressions generally given by the words I have used. European scholars, having hitherto been chiefly interested in the ancient languages of India and in the surprising inferences suggested by them, have very naturally acquiesced in the statements which the sole literary class has made about itself and its creed. But nothing can give a falser impression of the actual Brahminical religion than the sacred Brahminical literature. It represents itself as an organised religious system, whereas its great peculiarity, and (I may add) its chief interest, arises from its having no organisation

whatever. Incidentally, let me observe, we obtain a much more vivid impression of the prodigious effects upon Western Europe, I do not say of Christianity, but of an institution like the Christian Church, when we have under our observation in Central India a religion no doubt inspiring belief, but having no organised direction, and thus debarred from making war on alien faiths and superstitions. Brahminism is in fact essentially a religion of compromise. It reconciles itself with ancient forms of worship, and with new ones, when they become sufficiently prevalent, by taking them up into itself and by accepting the fashionable divinity as an incarnation of Vishnu or Siva. Thus Brahminism does not destroy but preserves older beliefs and cults, and with them the institutions which many of them consecrate and hold together. It cannot be doubted that Central India thus reproduces the old heathen world which Christianity destroyed. There prevails in it something like the paganism of classical antiquity, and this in the British territories shades off into the paganism, half absorbed in philosophical theory or mystical faith, which immediately gave way to the diffusion of the Christian creed. In the countries described by Mr. Lyall, every brook, every grove, every jutting rock, has its divinity; only with none of them is there any association of beauty; the genius of the race, radically differing in this from

the Hellenic genius, clothes them exclusively with grotesque or terrible forms. What is more to my present purpose, every institution, every pursuit, every power beneficent or maleficent, is consecrated by a supernatural influence or presidency. Thus ancient practices and customs, little protected by law, have always been protected by religion; nor would it be difficult to obtain the same protection for new laws, if sternly enforced, and for new manifestations of irresistible authority. I am persuaded that, if the British Government of India were not the organ of a free and Christian community, nothing would have been easier for it than to obtain that deification and worship which have seemed to some so monstrous when they were given to the Roman Emperors. In that mental atmosphere it would probably have grown up spontaneously; and, as a matter of fact, some well-known Indian anecdotes narrate the severity which has had to be used in repressing minor and isolated instances of the same tendency. One brave soldier and skilful statesman is remembered in India not only for his death at the head of the storming party which had just made its way into Delhi, but for having found himself the centre of a new faith and the object of a new worship, and for having endeavoured to coerce his disciples into disbelief by hearty and systematic flogging.

The common religious sanction binding the various

groups of native Indian society together finds an outward and practical expression in the usages of Caste. Here again the nearly exclusive attention paid in Europe to the Brahminical literature has spread abroad very erroneous ideas of a remarkable institution. The Brahminical theory of three or four universal castes has certainly considerable indirect influence, but the division of Hindoo society into accurately defined horizontal strata, if it ever existed as a fact (which it probably did not), exists no longer. There is only one perfect universal caste, that of the Brahmins; there are a certain number of isolated dynasties and communities pretending to belong to the second of the theoretical castes; but, in the enormous majority of instances, caste is only the name for a number of practices which are followed by each one of a multitude of groups of men, whether such a group be ancient and natural, or modern and artificial. As a rule, every trade, every profession, every guild, every tribe, every clan is also a caste, and the members of a caste not only have their own special objects of worship, selected from the Hindoo pantheon or adopted into it, but they exclusively eat together and exclusively intermarry. You will see at once that a solidity is thus given to all groups of men which has no counterpart in the Western world, and you can understand, I think, without difficulty, how it is that all the old natural elements of society

have been preserved under the influence of caste in extraordinary completeness, along with the institutions and ideas which are their appendage. At the same time, Mr. Lyall explains that the process of forming castes still continues, especially sectarian castes. A new sect, increasing in numbers and power, becomes a new caste. Even this dissolution and recombination tends, however, on the whole to preserve the ancient social order. In Western Europe, if a natural group breaks up, its members can only form a new one by voluntary agreement. In Central India they would recombine on the footing and on the model of a natural family.

Assuming then that the primitive Aryan groups, the primitive Aryan institutions, the primitive Aryan ideas, have really been arrested in India at an early stage of development, let me ask whether any, and, if so, what sort of addition to our knowledge may be expected from subjecting these phenomena to a more scientific examination, that is, an examination guided by the method which has already led to considerable results in other fields of comparative enquiry. I will try to illustrate the answer which should be given by taking one great institution, Property. It is unnecessary, I suppose, to enlarge on its importance. The place which it occupies as a source of human motive has been proclaimed by all sorts of writers, in all kinds of languages, in every mood and vein—gravely,

sadly, complacently, sarcastically. A large body of religious precept and moral doctrine clusters round it, and in our day the fact of its existence has been taken as the basis of a great deductive science, Political Economy. Yet any intelligent man who will be at the pains to ask himself seriously what he knows about its origin or the laws or mode of its historical growth will find that his knowledge is extraordinarily small. The best economical writers expressly decline to discuss the history of the institution itself, at most observing that its existence is for the good of the human race. Until quite recently the theories accepted concerning the early history of Property would scarcely bear a moment's examination. The popular account of it, that it had its origin in a state of nature, is merely a way of giving expression to our own ignorance, and most of the theories which till lately had currency on the subject are in reality nothing more than restatements of this view, more or less ingenious.

Now here, at all events, there is antecedent probability that something new may be learned from Indian observation and experience. For of the vast official literature produced during nearly a century by functionaries in the employment of the Indian Government, much the largest part is filled with a discussion of the Eastern forms of ownership and their relation to those of the West. If indeed these

observers had written upon institutions wholly unlike ours, their papers would have small interest for us. If Englishmen settled in India had found there kinds of property such as might be attributed to Utopia or Atlantis, if they had come upon actual community of goods, or an exact equality of all fortunes, or on an exclusive ownership of all things by the State, their descriptions would at most deserve a languid curiosity. But what they found was very like, and yet appreciably unlike, what they had left at home. The general aspect of this part of social mechanism was the same. There was property, great and small, in land and moveables; there were rent, profits, exchange, competition; all the familiar economical conceptions. Yet scarcely one of them exactly corresponded to its nearest Western counterpart. There was ownership, but joint ownership by bodies of men was the rule, several ownership by individuals was the exception. There was the rent of lands, but it had to be reconciled with the nearly universal prevalence of fixity of tenure and the consequent absence of any market standard. There was a rate of profit, but it was most curiously under the influence of custom. There was competition, but trade was conducted by large bodies of kinsmen who did not compete together; it was one large aggregate association which competed with another. The observations of these facts by Anglo-Indian functionaries

are more valuable than their speculations on them. Their chief desire has been to discover how the economical phenomena of the East could best be described in the economical language of the West, and I suppose that whole volumes have been written on two classes of these phenomena in particular, on the question whether the great share of the profits of cultivation taken by the British Government of India (like all Oriental governments) is properly called land-tax or rent, and on the question whether the protected or hereditary tenancy of the East is or is not a violation of the rights of property; or, in other words, whether it can be reconciled with the Western conception of ownership. Of these sagacious men, those best read in Western literature have, on the whole, been apt to borrow the habit of the English political economists, and to throw aside, under the name of *friction*, all the extraneous influences which clog the action of those wheels of social mechanism to which economical science, with much more justification in the West than in the East, confines almost wholly its attention. In point of fact, the value and importance of the retarding causes thus rejected could not have been understood until quite lately. The application of the historical method to property and to all the ideas which go with it, is among the most modern of undertakings. During the last five-and-twenty years German enquirers have been busy

with the early history and gradual development of European ownership, ownership, that is to say, of land. But the Historical Method in their hands has not yet been quickened and corrected by the Comparative Method, nor are they fully as yet aware that a large part of ancient Europe survives in India. They are thus condemned for awhile to struggle with the difficulties which embarrassed the scholar who speculated on the filiation and mutual relation of languages at a time when the reality of a Sanscrit literature was obstinately discredited, or when Sanscrit was believed to be an artificial cryptic dialect invented by the Brahmins.

The first step towards the discovery of new truth on these subjects (and perhaps the most difficult of all, so obstinate are the prejudices which stand in the way) is to recognise the Indian phenomena of ownership, exchange, rent, and price as equally natural, equally respectable, equally interesting, equally worthy of scientific observation, with those of Western Europe. The next will have been accomplished when a set of enquiries now actively conducted in the eastern parts of the Continent of Europe have been carried farther, and when a set of economical facts strongly resembling those familiar to Englishmen in India have been collected from Aryan countries never deeply affected by the Roman Empire on the one hand, nor by Mahometanism on the other—for Ma-

hometanism, of which the influence on Indian institutions and customs has been so slight as to be hardly worth taking into account, has elsewhere by its authority as a mixed body of religion and law completely transformed the character of whole populations. The last step of all will be to draw the proper inferences from the close and striking analogies of these widely diffused archaic phenomena to the ancient forms of the same institutions, social forces, and economical processes, as established by the written history of Western Europe. When all this has been done, it is not unsafe to lay down that the materials for a new science will exist, a science which may prove to be as great a triumph of the Comparative Method as any which it has hitherto achieved. I have not the presumption to advance any very positive predictions as to the conclusions at which it will arrive, but there is not much immodesty in laying before you, briefly and in general language, some of the results to which modern investigations into the history of the all-important institution of which we have been speaking, Property, appear to be at present pointing.

Whenever a corner is lifted up of the veil which hides from us the primitive condition of mankind, even of such parts of it as we know to have been destined to civilisation, there are two positions, now very familiar to us, which seem to be signally falsified

by all we are permitted to see—All men are brothers, and all men are equal. The scene before us is rather that which the animal world presents to the mental eye of those who have the courage to bring home to themselves the facts answering to the memorable theory of Natural Selection. Each fierce little community is perpetually at war with its neighbour, tribe with tribe, village with village. The never-ceasing attacks of the strong on the weak end in the manner expressed by the monotonous formula which so often recurs in the pages of Thucydides, 'they put the men to the sword, the women and children they sold into slavery.' Yet, even amid all this cruelty and carnage, we find the germs of ideas which have spread over the world. There is still a place and a sense in which men are brothers and equals. The universal belligerency is the belligerency of one total group, tribe, or village, with another; but in the interior of the groups the regimen is one not of conflict and confusion but rather of ultra-legality. The men who composed the primitive communities believed themselves to be kinsmen in the most literal sense of the word; and, surprising as it may seem, there are a multitude of indications that in one stage of thought they must have regarded themselves as equals. When these primitive bodies first make their appearance as landowners, as claiming an exclusive enjoyment in a definite area of land, not only do their

shares of the soil appear to have been originally equal, but a number of contrivances survive for preserving the equality, of which the most frequent is the periodical redistribution of the tribal domain. The facts collected suggest one conclusion which may be now considered as almost proved to demonstration. Property in Land, as we understand it, that is, several ownership, ownership by individuals or by groups not larger than families, is a more modern institution than joint property or co-ownership, that is, ownership in common by large groups of men originally kinsmen, and still, wherever they are found (and they are still found over a great part of the world), believing or assuming themselves to be in some sense of kin to one another. Gradually, and probably under the influence of a great variety of causes, the institution familiar to us, individual property in land, has arisen from the dissolution of the ancient co-ownership.

There are other conclusions from modern enquiry which ought to be stated less confidently, and several of them only in negative form. Thus, wherever we can observe the primitive groups still surviving to our day, we find that competition has very feeble play in their domestic transactions, competition (that is) in exchange and in the acquisition of property. This phenomenon, with several others, suggests that Competition, that prodigious social force of which the action is measured by political economy, is of

relatively modern origin. Just as the conceptions of human brotherhood and (in a less degree) of human equality appear to have passed beyond the limits of the primitive communities and to have spread themselves in a highly diluted form over the mass of mankind, so, on the other hand, competition in exchange seems to be the universal belligerency of the ancient world which has penetrated into the interior of the ancient groups of blood-relatives. It is the regulated private war of ancient society gradually broken up into indistinguishable atoms. So far as property in land is concerned, unrestricted competition in purchase and exchange has a far more limited field of action even at this moment than an Englishman or an American would suppose. The view of land as merchantable property, exchangeable like a horse or an ox, seems to be not only modern but even now distinctively Western. It is most unreservedly accepted in the United States, with little less reserve in England and France, but, as we proceed through Eastern Europe, it fades gradually away, until in Asia it is wholly lost.

I cannot do more than hint at other conclusions which are suggested by recent investigation. We may lay down, I think at least provisionally, that in the beginning of the history of ownership there was no such broad distinction as we now commonly draw between political and proprietary power, between the

power which gives the right to tax and the power which confers the right to exact rent. It would seem as if the greater forms of landed property now existing represented political sovereignty in a condition of decay, while the small property of most of the world has grown—not exclusively, as has been vulgarly supposed hitherto, out of the precarious possessions of servile classes—but out of the indissoluble association of the status of freeman with a share in the land of the community to which he belonged. I think, again, that it is possible we may have to revise our ideas of the relative antiquity of the objects of enjoyment which we call moveables and immoveables, real property and personal property. Doubtless the great bulk of moveables came into existence after land had begun to be appropriated by groups of men; but there is now much reason for suspecting that some of these commodities were severally owned before this appropriation, and that they exercised great influence in dissolving the primitive collective ownership.

It is unavoidable that positions like these, stated as they can only be stated here, should appear to some paradoxical, to others unimportant. There are a few perhaps who may conceive a suspicion that, if property as we now understand it, that is, several property, be shown to be more modern, not only than the human race (which was long ago assumed),

but than ownership in common (which is only beginning to be suspected), some advantage may be gained by those assailants of the institution itself whose doctrines from time to time cause a panic in modern Continental society. I do not myself think so. It is not the business of the scientific historical enquirer to assert good or evil of any particular institution. He deals with its existence and development, not with its expediency. But one conclusion he may properly draw from the facts bearing on the subject before us. Nobody is at liberty to attack several property and to say at the same time that he values civilisation. The history of the two cannot be disentangled. Civilisation is nothing more than a name for the old order of the Aryan world, dissolved but perpetually re-constituting itself under a vast variety of solvent influences, of which infinitely the most powerful have been those which have, slowly, and in some parts of the world much less perfectly than others, substituted several property for collective ownership.

If such a science as I have endeavoured to shadow forth in this Lecture is ever created, if the Comparative Method applied to laws, institutions, customs, ideas, and social forces should ever give results resembling those given by Comparative Philology and Comparative Mythology, it is impossible that the consequences should be insignificant. No knowledge,

new and true, can be added to the mental stock of mankind without effects penetrating deeply and ramifying widely. It is conceivable that, as one result, we of Western Europe might come to understand ourselves better. We are perhaps too apt to consider ourselves as exclusively children of the age of free-trade and scientific discovery. But most of the elements of human society, like most of that which goes to make an individual man, come by inheritance. It is true that the old order changes, yielding place to new, but the new does not wholly consist of positive additions to the old ; much of it is merely the old very slightly modified, very slightly displaced, and very superficially recombined. That we have received a great legacy of ideas and habits from the past, most of us are at least blindly conscious ; but no portion of the influences acting on our nature has been less carefully observed, and they have never been examined from the scientific point of view. I conceive that the investigations of which I have been speaking might throw quite a new light on this part of the social mechanism.

As one consequence of a new method of enquiry, I believe that some celebrated maxims of public policy and private conduct, which contain at most a portion of truth, might be revised and corrected. Among these I do not hesitate to place the famous Greatest Happiness principle of Bentham. In spite

of the conventional obloquy attaching to his name, and strong as is the reluctance to accept the greatest happiness of the greatest number as the standard of morality, no observant man can doubt that it is fast taking its place in the modern world as the regulative principle of all legislation. Yet nobody can carefully examine the theory of human nature which it implies without seeing that it has great imperfections, and that unless some supplementary qualifying principles be discovered, a host of social experiments will bring with them a vast measure of disappointment. For these qualifications I look forward far less to discussions on moral philosophy as it is at present understood, than to some such application of the comparative method to custom, idea, and motive as I have tried to recommend. Another illustration of my meaning I will take from Political Economy. The science consists of deductions from the assumption that certain motives act on human nature without check or clog. There can be no question of the scientific propriety of its method, or of the greatness of some of its practical achievements ; yet only its bigots assert that the motives of which it takes account are the only important human motives, or that whether they are good or bad, they are not seriously impeded in their operation by counteracting forces. All kinds of irrelevant charges, or charges weak to puerility, have been brought against political

economy; but no doubt the best of its expositors do occasionally lay themselves open to the observation that they generalise to the whole world from a part of it; that they are apt to speak of their propositions as true *à priori*, or from all time; and that they greatly underrate the value, power, and interest of that great body of custom and inherited idea which, according to the metaphor which they have borrowed from the mechanicians, they throw aside as friction. The best corrective which could be given to this disposition would be a demonstration that this 'friction' is capable of scientific analysis and scientific measurement; and that it will be shown to be capable of it I myself firmly believe.

For some obvious reasons, I refrain from more than a mere reference to one set of effects which observation of India might have on European thought, those which might be conceived as produced by the spectacle of that most extraordinary experiment, the British government of India, the virtually despotic government of a dependency by a free people. Here, I only venture to assert that observation of the British Indian political system might throw a flood of new light on some obscure or much misunderstood epochs of history. I take an example in the history of the Romans under the Empire. It has been written with much learning and acumen; yet it is wonderful how little popular knowledge has advanced since Gibbon

published the 'Decline and Fall.' In our popular literature the old commonplaces hold their ground; the functionaries are described as everywhere oppressive and corrupt, the people as enervated, the taxation as excessive, the fortunes of the State are treated as wholly bound up with the crimes and follies of the Emperors. The incompleteness, in some respects the utter falsity of the picture, is well known to the learned, yet even they have perhaps hardly made enough of the most instructive parallels furnished by the British government of India. The remark has been made that the distinction between the provinces of the Senate and the provinces of the Prince seemed to be the British Indian distinction between a Regulation and a Non-Regulation province, but few know how curiously close is the analogy, and how the history of the competing systems has run precisely the same course. Few, again, have quite understood how the ordinary administration of a Native Indian State, or of a British Province under semi-military rule, throws light upon the condition of the Jewish Commonwealth during that era of supreme interest and importance when it was subject to the Romans, and yet not completely incorporated with the Empire. What may be called the secular portions of the Acts of the Apostles come strangely home to Indian functionaries. They know better than other men what sort of princes were Herod Antipas and Agrippa;

how natural to different forms of the official mind is the temper of Festus on the one hand and the temper of Gallio on the other ; how steady is the effort of priestly classes to bring secular authority to their side ; how very important and turbulent an interest is that of the makers of silver shrines for the goddess; and how certainly, if the advent of Christian missionaries were to cause a riot in an Indian city, the Deputy Commissioner would send for the leading citizens and, in very nearly the words of the town-clerk of Ephesus, would tell them that, if they had anything to complain of, there were Courts and the Penal Code. Turning to more general topics, let me say that a problem now much perplexing historical scholars is simplified by experience of India. How was it that some institutions of the Provinces were crushed down and levelled by the Roman Imperial system, while others, derived from the remotest Aryan antiquity, were kept in such preservation that they easily blended with the institutions of the wilder Aryan races who broke into the Empire? British India teaches us that part of the destroying process is inevitable; for instance, the mere establishment of a Court of Justice, such as a Roman Court was, in Gaul would alter and transform all the customary rights of the Gallic Celts by arming them with a sanction. On the other hand, certain institutions of a primitive people, their corporations and

village-communities, will always be preserved by a suzerain state governing them, on account of the facilities which they afford to civil and fiscal administration. Both the good and the evil of the Roman Empire are probably reproduced in British India. There are the almost infinite blessings of the Pax Britannica, and an enormous growth of wealth, comfort, and material happiness ; but there are some drawbacks, and among them no doubt is the tendency of a well-intentioned, and, on the whole, successful government, to regard these things as the sum of all which a community can desire, and to overlook the intangible moral forces which shake it below the surface.

From whatever point of view India is examined, if only it be carefully and conscientiously examined, one consequence must, I think, certainly follow. The difficulty of the experiment of governing it will be better understood, and possibly the undertaking will be regarded with more consideration. The general character of this difficulty may be shortly stated. There is a double current of influences playing upon this remarkable dominion. One of these currents has its origin in this country, beginning in the strong moral and political convictions of a free people. The other arises in India itself, engendered among a dense and dark vegetation of primitive opinion, of prejudice if you please, stub-

bornly rooted in the débris of the past. As has been truly enough said, the British rulers of India are like men bound to make their watches keep true time in two longitudes at once. Nevertheless the paradoxical position must be accepted. If they are too slow, there will be no improvement. If they are too fast, there will be no security. The true solution of the problem will be found, I believe, in some such examination and classification of Indian phenomena as that of which I have been venturing to affirm the possibility. Those who, guided solely by Western social experience, are too eager for innovations which seem to them indistinguishable from improvements, will perhaps be overtaken by a wholesome distrust when they see in institutions and customs, which would otherwise appear to them ripe for destruction, the materials of knowledge by which the Past, and to some extent the Present, of the West may be interpreted. On the other hand, though it be virtually impossible to reconcile the great majority of the natives of India to the triumph of Western ideas, maxims, and practices, which is nevertheless inevitable, we may at all events say to the best and most intelligent of them that we do not innovate or destroy in mere arrogance. We rather change because we cannot help it. Whatever be the nature and value of that bundle of influences which we call Progress, nothing can be more certain than that, when a society

is once touched by it, it spreads like a contagion Yet, so far as our knowledge extends, there was only one society in which it was endemic ; and putting that aside, no race or nationality, left entirely to itself, appears to have developed any very great intellectual result, except perhaps Poetry. Not one of those intellectual excellencies which we regard as characteristic of the great progressive races of the world—not the law of the Romans, not the philosophy and sagacity of the Germans, not the luminous order of the French, not the political aptitude of the English, not that insight into physical nature to which all races have contributed—would apparently have come into existence if those races had been left to themselves. To one small people, covering in its original seat no more than a handsbreadth of territory, it was given to create the principle of Progress, of movement onwards and not backwards or downwards, of destruction tending to construction. That people was the Greek. Except the blind forces of Nature, nothing moves in this world which is not Greek in its origin. A ferment spreading from that source has vitalised all the great progressive races of mankind, penetrating from one to another, and producing results accordant with its hidden and latent genius, and results of course often far greater than any exhibited in Greece itself. It is this principle of progress which we Englishmen are communicating

to India. We did not create it. We deserve no special credit for it. It came to us filtered through many different media. But we have received it; and as we have received it, so we pass it on. There is no reason why, if it has time to work, it should not develope in India effects as wonderful as in any other of the societies of mankind.

ADDRESS TO UNIVERSITY OF CALCUTTA.[1]

Those Members of the Senate who have been connected with our University since its foundation, will not be surprised if, in what I have to say to you, I depart in some degree from the addresses of former Vice-Chancellors. I have obtained from the Registrar copies of those addresses, so far as they have been reported, and I see that they are principally devoted to explaining to the Native Students, and through them to the Natives of India generally, what is the nature of a University, and to impressing on them the value of the distinctions it confers. It is not, I think, necessary to dwell any longer on those topics; indeed I am not sure that more harm than good would not be done by my dwelling on them. There is now more evidence than enough that our University has taken root. I have seen it stated that the increase in the numbers of the older English Universities is about six per cent.; but the increase of the University of Calcutta is no longer expressed by

[1] (Delivered before the Senate, March 1864.)

taking a percentage; it is not even expressed by saying that our numbers have doubled or trebled. The number of entrances has positively sextupled since the foundation of the University six years ago, which is a rate of growth never seen out of the tropics. It is easy to be wise after the event; but I think I could have predicted this. Knowing as I do how deeply the taste for University distinctions penetrates even in England, although there it has to compete with the almost infinitely varied and multiplied forms which English enterprise assumes, I think I could have foreseen that a society like the native society of Bengal—a society whose faults no less than its excellencies lie on the side of mental acuteness, and which from its composition and circumstances has comparatively few facilities for the exercise of activity—I could have foreseen that such a society could be stirred to its inmost depths by an institution which conferred visible and tangible rewards on the early and sometimes, it is to be feared, the precocious display of intellectual ability. What now remains to be done is not so much to stimulate the ambition which seeks to gratify itself by a University degree or honour, as to make provision that those honours and degrees are really the symbols and the witnesses of solid acquirements. My predecessors have, I see, striven to bring out the points of similarity between this University and the

Universities of England. We should merely be imitating their external and temporary characteristics if we omitted to follow them in that one characteristic which has redeemed all their shortcomings—the thoroughness of their tests and the conscientiousness of their teaching. It would be vain to deny, and I am sure that I do not care to deny, that Oxford and Cambridge have in time past been guilty of many faults both of omission and of commission. They have failed to teach much which they ought to have taught, and taught much which they ought not to have taught; but whatever they did teach, they have taught with a stern and severe completeness. Their weak side has been intolerance of new subjects of thought; their strong side has been their intolerance of superficiality. It is this direction which all our future efforts, the efforts both of the University and of all the Colleges affiliated to it, ought to follow; and this direction has, I am happy to say, been in fact followed in those alterations of our course to which the Senate has recently given its sanction—alterations of which the principal credit belongs, as I am sure all associated with him will allow, to my immediate predecessor Mr. Erskine One great step forwards has been made in the substitution, of course the partial and gradual substitution, of classical languages for vernacular or spoken languages, as subjects of examination. I

will not trouble you with all the grounds on which this reform is justified. If you wish to understand them thoroughly, I commend you to the published writings of the accomplished scholar—whom I am proud to call my friend—who is Vice-Chancellor of the University of Bombay.[1] But independently of the difficulty of examining in languages many of which have no true literature, which have only a factitious literature, a literature of translations, you must see what a premium is placed upon flimsiness in knowledge when a young man is examined in a spoken dialect, which is picked up, half unconsciously, in conversation and by the ear, against another young man who is examined in one of those classical languages which, before they are mastered, bring out the strongest powers of the memory and the reason. There is really nothing in common between the linguistic attainments of a student who passes or obtains honours in Greek, or Sanscrit, or Arabic, and those of one who passes in Burmese or Oorya, or —for this is, to a certain extent, true of those languages—even in Bengali or Hindustani.

I have spoken of superficiality as our great danger. But do not suppose that I am insinuating anything with respect to the actual performances of the students. The Registrar has furnished me with some samples

[1] Sir Alexander Grant, now Principal of the University of Edinburgh.

of the papers which contain the answers. My impression, which coincides, I believe, with that of the Examiners, is that, in those subjects in which high proficiency may reasonably be expected, the evidence of industry, quickness and clearness of head, is not very materially smaller than the proof of similar qualities furnished by a set of English examination papers. Superficiality will to some extent form part of the results of every examination, but I cannot conscientiously say that I have seen much more of it here than in the papers of older Universities. And now, as I am on this topic, I will observe that there is one characteristic of these papers which has struck me very forcibly. It is the extraordinary ambition of the Native Student to write the best—perhaps I should rather say the finest—English. In some cases the attempt has been singularly successful; in others it has failed, and I think I may do some good to the Native Students present if I say why I consider it has failed. It has failed, then, because the attempt has been too consciously and deliberately made. Of course I do not forget that these Students are writing in a foreign tongue, and that their performances are justly compared only with those Latin themes which some of the gentlemen around me have written in their youth. But on the other hand, the English of a Bengali lad is acquired for permanent

and practical purposes, to be written and spoken to, and among, those who have written and spoken it from their infancy. Under such circumstances, English can only be well written by following the golden rule which Englishmen themselves follow or ought to follow, and that rule is never to try deliberately to write it well. Depend upon it, no man ever wrote well by striving too hard to write well. What you should regard, is not the language but the thought, and if the thought be clearly and vividly conceived, the proper diction, if the writer be an educated man, will be sure to follow. You have only to look to the greatest Masters of English style to satisfy yourselves of the truth of what I have said. Take the first illustration which always suggests itself to an Englishman, and look at any one page of Shakespeare. After you have penetrated beneath the poetry and beneath the wit, you will find that the page is perfectly loaded with thought; and so, you may depend upon it, it will always be at all times and with all writers. The more you read, the more convinced will you be that the finest fancies are formed, as diamonds are said to be formed, under the pressure of enormous masses of thought. The opposite process, that of trying to bring in at all hazards some favourite phrase or trick of language, will only lead you to a spurious and artificial result. I have said so much as this, because what I have read and heard

leaves me no doubt that the accomplishment of writing good English is something which lies very near to the heart of the Native Students.

I have now to address myself to matters which are of equal interest to all of us, to the events which have marked the history of the University during the year. The most conspicuous of these events is the calamity which deprived us of our Chancellor, as it did India of its Viceroy. I am very sensible that, in speaking to the Members of the University of Lord Elgin, I must use the same language which all who were associated with him are obliged to use of his government of India—that he died too soon for much visible proof to be given of the good intentions of which his heart was full. What I have to say of him with more particular relation to the University, I will postpone for a moment or two, and I pass to another incident of the year's history, of which I could almost be contented to say that no heavier blow has fallen on the University since its foundation—I mean the final departure from India of our colleague, Dr. Duff. It would be easy for me to enumerate the direct services which he rendered to us by aiding us, with unflagging assiduity, in the regulation, supervision, and amendment of our course of study; but, in the presence of so many Native Students and Native Gentlemen who viewed him with the deepest regard and admiration, although

they knew that his every-day wish and prayer was to overthrow their ancient faith, I should be ashamed to speak of him in any other character than the only one which he cared to fill—the character of a Missionary. Regarding him, then, as a Missionary, the qualities in him which most impressed me—and you will remember that I speak of nothing except what I myself observed—were first of all his absolute self-sacrifice and self-denial. Religions, so far as I know, have never been widely propagated, except by two classes of men, by conquerors or by ascetics. The British Government of India has voluntarily (and no doubt wisely) abnegated the power which its material force conferred on it, and, if the country be ever converted to the religion of the dominant race, it will be by influences of the other sort, by the influence of Missionaries of the type of Dr. Duff. Next I was struck—and here we have the point of contact between Dr. Duff's religious and educational life—by his perfect faith in the harmony of truth. I am not aware that he ever desired the University to refuse instruction in any subject of knowledge, because he considered it dangerous. Where men of feebler minds or weaker faith would have shrunk from encouraging the study of this or that classical language, because it enshrined the archives of some antique superstition, or would have refused to stimulate proficiency in this or that walk of physical

science, because its conclusions were supposed to lead to irreligious consequences, Dr. Duff, believing his own creed to be true, believed also that it had the great characteristic of truth—that characteristic which nothing else except truth possesses—that it can be reconciled with everything else which is also true. If you only realize how rare this combination of qualities is—how seldom the energy which springs from religious conviction is found united with perfect fearlessness in encouraging the spread of knowledge, you will understand what we have lost through Dr. Duff's departure, and why I place it among the foremost events in the University year. The next incident I have to advert to, in relation to the University of Calcutta, is not a fact, but the contrary of a fact. Most of you have heard of the munificent donations which have been made to the University of Bombay by the Native community of that Presidency. I am sorry to have to state that there is nothing of the kind to record of Calcutta. I do not mean to say anything harsh when I declare that our position, in regard to the Natives of Bengal, is one of perpetually giving and never taking—of always conferring and never receiving. We have sextupled our students, but it is humiliating to have to state that the only assistance accruing to the higher education in Bengal from any quarter, except the Government, has consisted in the right to share

in a fund for the encouragement of legal studies created by a Bombay gentleman. Of course I cannot pretend to be ignorant of the cause of this. It comes from the bad habit of looking to the Government as the sole natural author of every public benefit; and, permit me to say, that the European portion of society appear to me a little under the influence of the same error which seems to stint the liberality of the Natives. Some people appear to think that the University will never have attained a footing of respectability, until we are lodged in the building which has been promised to us. I shall be glad when we get that building, and I hope we shall get it; but except for its mere material convenience, I shall attach the very smallest importance to it. It is not public money, or the results of public money, that we should care to obtain. Depend upon it, the vitality of a University is proved not by the amounts which, by begging or bullying, it can extract from the guardians of the public purse; it is proved by those benefactions which are the natural payment of society for the immense benefits which it receives through the spread of education. Look to our two great English University towns. They are absolutely constructed of the monuments of private liberality; even the Kings and Queens who built some of their most magnificent structures, built them from their private resources, and not, as an Indian Ruler must always

do, out of the taxes, paid to a great extent as taxes always must be, by the poorest of the poor. Yet I think that if ever there was a country in which we might expect the wealthier classes to have the ambition of perpetuating their names by University endowments, it is India. There seems to me to be no country in which men look so far forward or so far backward —in which men so deliberately sacrifice their lives to the consideration of what their ancestors have done before them, and of what their descendants will do after them. I may surprise some of you by saying this; but it is my fixed opinion, that there is no surer, no easier, and no cheaper road to immortality, such as can be obtained in this world, than that which lies through liberality expending itself in the foundation of educational endowments. I turn again to the older English Universities, which I mention so often because I know them best. If you could transport yourselves to Oxford or Cambridge, you would hear ringing in your ears the names of hundreds of men whose memories would have perished centuries ago if they had not linked them to the Universities by their benefactions. I will give you an example. After you pass out of the gate of my own College at Cambridge, you have before you one of the most famous, one of the most beautiful, one of the most useful of University foundations. It is called Caius College, and it is the chief school of

medicine in the University. Who was Caius, the founder? I will not say that he was an entirely obscure man—that would be unjust to his memory—but he was a man, a successful physician, who would have been thoroughly well forgotten, if he had not so bestowed a part of his wealth that his name is daily in the mouth of hundreds, it may be thousands, of the educated youth of England. That is only one instance. Oxford and Cambridge, however, are full of them; colleges, scholarships, exhibitions, prizes, each of them is associated with some name, which, but for the association, would have fallen into oblivion long since, but which, as it is, is stamped upon the memory of multitudes just at the period of life when the impressions received are practically ineffaceable. It may almost be said that a founder of University endowments obtains for himself a new family. I have been told that there are in India certain companies of Hindoo ascetics—some of them largely endowed—where the descent and the title to the property are traced, not from father to son, but from disciple to disciple. The records of an English College exhibit just this sort of genealogical tree. The Collegiate society forms a perpetually renewed family, and no family was ever prouder of its ancestor. Indeed, it sometimes happens that men of no mean birth almost prefer this pedigree to their own. I will mention one of them—the late Viceroy

of India. Lord Elgin was, as you know, the descendant of the most famous King in the line of Scottish Kings, and yet I doubt whether he was prouder of this great ancestry, or prouder of any of his successes in government or policy, than of the honour which he obtained in his youth when he was elected a Fellow of Merton College at Oxford.

I have now a very few words more to say, and these shall be addressed to those for whom this Meeting is principally intended—the Native Students who have just taken their degrees. As I stated when I began, I do not think that the taste of the Native youth of Bengal for intellectual knowledge requires to be much stimulated; there are too many motives at work to encourage it; still there is one motive which I will dwell upon for a moment, because, if it were properly appreciated, it would at once be the strongest and the most legitimate inducement to exertion. Probably, if we could search into the hearts of the more refined portions of the Native community, we should find that their highest aspiration was to be placed on a footing of real and genuine equality with their European fellow-citizens. Some persons have told them that they are equal already, equal in fact as they undoubtedly are before the law Most of you have heard of one remarkable effort which was made to establish this position. A gentle-

man, who was then a Member of the Government of India, Mr. Laing, went down to the Dalhousie Institute, and, in a Lecture delivered there, endeavoured to popularize those wonderful discoveries in philological science which have gone far to lift the hypothesis of the common parentage of the most famous branches of the human family to the level of a scientific demonstration. I do not know that anybody was ever more to be admired than Mr. Laing for that act of courage, for I know how obstinate were those prejudices which he sought to overthrow, and to what a height they had risen at the moment when he spoke. The effect produced by his lecture on the Aryan race must have been prodigious, for I am sure I scarcely see a single native book or newspaper which does not contain some allusion to Mr. Laing's argument. Yet although what Mr. Laing then taught is truth, nothing can be more certain than that it is barren truth. Depend upon it, very little is practically gained by the Native when it is proved, beyond contradiction, that he is of the same race with the Englishman. Depend upon it, the true equality of mankind lies, not in the past, but in the future. It may come—probably will come—but it has not come already. There are some, who, like our late colleague, Dr. Duff, believe that the time will arrive, when all men in India will be equal under the shadow of the same religious faith. There are some

—more perhaps in number—who look forward to a moral equality, who hope and expect that there will be a period when everybody in India will subscribe to the same moral creed, and entertain the same ideas as to honour, as to veracity, as to the obligation of promises, as to mercy and justice, as to that duty of tenderness to the weak which is incumbent on the strong. But those epochs are still distant, one probably much more distant than the other. Meantime the equality which results from intellectual cultivation is always and at once possible. Be sure that it is a real equality. No man ever yet genuinely despised, however he might hate, his intellectual equal. In Europe, the only community, which, so far as I see, is absolutely undivided by barriers of race, of nationality, of prejudice, of birth and wealth, is the community of men of letters and of science. The citizens of that Republic have before now corresponded with each other and retained their friendships, while the deadliest wars were separating their fellow-countrymen. I have heard that they are even now corresponding in the midst of the bloody conflict which desolates America. The same influences which can overpower the fierce hatreds bred by civil war can assuredly beat down the milder prejudices of race and colour, and it is as fountains of such influences that I believe the Universities will count for something, if they do count for anything, in the history of British India.

ADDRESS TO UNIVERSITY OF CALCUTTA.[1]

It remains for me to follow former Vice-Chancellors, in impressing on the students who have just taken their degrees, the value of the training through which they have passed. But there is this difficulty. Much that has been said by my predecessors was, I have no doubt, new in their mouths, and even startling to the Native part of their audience. But the intellectual developement of Bengal has been so rapid, that many of those positions have passed here into the stage which they occupy in Europe, and have grown into mere commonplace. Now, the danger of dwelling on commonplaces is this, that it tempts men of acute minds—and there are no acuter minds than those of the educated Bengalis—to question and deny them ; and thus it helps to put out of sight the important fact, that nothing becomes commonplace which does not contain so large a proportion of truth as to make it commend itself at once to the perceptions of the great mass of mankind. I could

[1] Delivered before the Senate of the University of Calcutta in March 1865.

hardly do a greater evil in a short time than by tempting my Native audience to doubt the advantages of education, simply because their reiteration has become tedious. It is not, then, because I doubt these general advantages any more than other Vice-Chancellors, than Mr. Ritchie, or Sir James Colville, or Lord Canning, but because no one here doubts them, that I put them aside to-day. What I wish to do now is, simply to say a few words to each class of the graduates who have just taken their degrees, as to the separate and special training which they have passed through.

Naturally, the first class to which I should wish to address myself would be the Graduates in Law— those who are about to join my own profession. Most of you are aware that the number of those gentlemen who have just taken their degrees in law, considerable as it is, does not distantly represent the number of those who are destined, in one way or another, to follow the profession of law. Probably a large majority of the Graduates in Arts, of those who have just taken their degrees, and even of those who are studying in the Colleges, will become lawyers in some time, either as members of the Judicial service, or as pleaders, or as persons attached to the establishments of the various law Courts. Now, I know that there are many among my own countrymen who think that these crowds of Natives flocking to the law

are a morbid and unhealthy symptom. And I, of course, admit that it is not a model society in which there is permanently a superfluity of lawyers. But, whether we like or dislike the symptom, there is no doubt of its being healthy and natural. There are many around me who are familiar with the accounts received of the multitudes who crowded the Bar in the early times of the Roman Republic—accounts, which would not be credible if the same state of things had not shown itself in modern Europe, after the revival of letters. I doubt not that the phenomenon which now shows itself in Bengal at this moment, is to be explained in the same way. Experience proves that the first result of intellectual cultivation in any community is always to divert an extraordinarily large part of its youth to the Bar. The reason of it is not hard to find. The pursuit of the law is one of the very few walks of life which offer attractions both to practical and to speculative tastes. It gratifies the passion of all young educated minds for generalization, but the materials for generalization—the materials which they fit in to general rules—are the business and the concerns of everyday life. The practice of the law combines the attractions of the closet and of the market-place; it is money-making and study at the same time. I can, therefore, understand the multitude of young educated Bengalis who give themselves to the law. And the aptitude of the

young Native for the pursuit of law is now placed beyond question, although, of course, there has not been quite time to reach the highest level of legal accomplishment. A gentleman who may be supposed to speak with more authority than any one in India on this subject, Sir Barnes Peacock, the Chief Justice of Bengal, informed me once that an average legal argument by Native Vakeels in the Appellate High Court was quite up to the mark of an average legal argument in Westminster Hall; and that is very high praise indeed. On the other hand, complaints do reach me—these complaints are of course more addressed to the Native Bar of the country districts than to the Native Bar of the Presidency Towns—of a tendency to prefer subtlety to breadth, and of an over-love for technicality. Now, I should like to say a few words about this fault of over-technicality and over-subtlety, which I know, of course, to be the fault attributed to all lawyers by laymen. Perhaps I shall surprise some of you if I say that, if I were asked to give a definition of law to persons quite ignorant of it —I mean, of course, a rough and a popular, not a scientific definition or description—I should say that law is common sense. Of course, that is only true with very considerable reservations and abatements. If is not absolutely true even in England, where law has been cultivated for centuries by the flower of the national intellect, an intellect wedded, above all

things, to common sense. And again, whatever the result of the admirable Codes we are introducing, it is far from being true here. But still, with all reservations and all abatements, the proposition that law is common sense is much truer than any one looking at the subject from outside can possibly conceive. What conceals this from laymen is the fact that law, being not simply a science to be learned, but an art to be applied, has, like all arts, to be thrown into technical forms. Technicalities are absolutely indispensable to lawyers, just as the ideas of form, and proportion, and colour have to be thrown into a technical shape before they can give birth to painting or sculpture. A lawyer cannot do without technical rules, any more than a sculptor or a painter; but still, it is universally true that a disposition to overrate technicalities, or to value them for their own sake, is the characteristic mark of the journeyman, as distinguished from the artist. A very technical lawyer will always be a third-rate lawyer. The remedy, then, which I would apply to this alleged infirmity of the Native legal mind is simply this—always prefer the substance to the accident. If you are tempted to value a particular legal conclusion for its subtlety or (what sometimes comes to the same thing) its oddity or perversity, rather than its reasonableness, you may always safely suspect yourself. Technical rules will sometimes lead to perverse results, for

technicalities framed in one generation occasionally fail to give the results expected from them in another, and, of course, technicalities reasonable in one quarter of the world sometimes do not serve their purpose in another. But still, after all, the grand criterion of legal soundness is common sense, and if you are inclined to employ an argument, or to draw an inference, or to give an opinion which does not satisfy the test, which is out of harmony with experience and with the practical facts of life, I do not say, reject it absolutely, but strongly suspect it, and be sure that the presumption is heavily against it.

I can speak to the next class of graduates, the medical graduates, with much less confidence. I suppose all of us feel that Medicine is a subject in which our interest is out of all proportion to our knowledge. Yet there is one complaint, which I think that a younger generation of medical men are likely to hear more frequently and more impatiently made than did their predecessors. A friend of mine once, in this very room, though to a very different audience, said he had no belief in medicine, that it was an art which made no progress. Now, I know that medical men, conscious as they are of daily additions to their knowledge, are apt to regard such complaints as the fruit of presumptuous ignorance; but it may be worth while to examine the particle of truth which makes such a view of this art possible

to highly intelligent men, looking at it from outside. I believe that the eminent members of the medical profession who are now round about me, will agree with me that medicine is a general term, embracing a vast group of arts and sciences, all subordinate to one master-art, the art of healing. All these contributory arts and sciences—physiology, pathology, toxicology, chemistry—are advancing at a vast rate, even with a speed beyond the march of other sciences; because, to the influences which stimulate the progress of other sciences is added, in their case, the poignant spur of professional ambition and interest; and whenever all these arts and sciences are completed, medicine will be most perfect and complete of all the arts. But, by the very necessities of their profession, medical men are compelled to act as if an art was complete which is only completing itself. We are constituted of too frail a structure to be able to wait for the long result of time, and our infirmities place medical men at a disadvantage, as compared with other men of science, by forcing them to anticipate a consummation which may be near but has not yet been reached. The scepticism, then, to which I have referred is the result of a misunderstanding, and is the necessary consequence of the position of the art; it is surely pardonable, for to Europeans, at all events, in India, the common saying, 'art is long — life is short,' has sometimes a terrible

significance. Perhaps it would be well if the misunderstanding were cleared up, and language were used on both sides which would reconcile the justifiably unqualified language of medical men as to the progress of their art, with the not unjustifiable impatience of those who are sometimes tempted to think that it does not move at all.

There remains one class, the largest of all, the graduates in Arts. Since their education is only introductory to pursuits and walks of life to be followed afterwards, I can only speak to them in general language, and therefore with but slight effect. But there are some peculiarities in the course which they have gone through, which make a considerable impression on a person like myself, who am pretty well acquainted with the analogous course of the English Universities. The peculiarity of the course of the University of Calcutta which most strikes me is this—the nearer equality on which the Calcutta course, as compared with that of Oxford or Cambridge, places the subjects of study, which are there classed as the new and the old. Nominally, our course is just the same as that of the English University. We examine in classics, mathematics, history, physical science, and (what does not seem to me a correct term) moral science. But at Oxford and Cambridge two of these subjects, classics and mathematics, are much older than the others, and the new

branches of study have a hard fight to maintain their credit and popularity against the prestige of the old. It is found still, I believe, very difficult to get either teachers or pupils to attach the same importance to eminence in the new studies which attaches to distinction in classics or in mathematics. Hence it is, that there is no commoner subject of discussion among persons interested in education than the relative priority which should be assigned to those branches of knowledge—which of them ought to take the lead in point of honour, and which is able to furnish the best training for the mind; and I have seen recently, from some papers which came from England, in particular from the Report of the Public Schools' Commissioners, that the controversy is still going on. I will not state the arguments used in England, which would strike many of you as somewhat conventional and traditional. But still, the question, which of these branches of study is really destined to take precedence over the rest, and to bring the others under its influence, is a question of interest, and in India even of some importance. Of course, but few graduates in Arts here, as in England, will follow in after-life the studies of their period of education. nor is it desirable that many should follow them. Some few, however, will do it with advantage, and it is to this minority that I address the remarks I am going to make.

I will take, first, one of the branches of study which enter into our course, History, and I select it, not because it is the one I mean, but because there is probably no one in the room who has not some elementary knowledge of its nature and objects. If the question were put, Why should history be studied? the only answer, I suppose, which could be given is, Because it is true: because it is a portion of the truth to which it is the object of all study to attain. It is, however, an undoubted fact that the quality of the truth expected from history has always been changing and cannot be said to be even now settled. Beyond all question, it grew every where out of Poetry, and long had its characteristics even in the Western world. In the East, as my Native auditors know, down to comparatively modern times the two forms of truth, the poetical and historical form, were incapable of being disentangled from one another. In the West, which alone has seen the real birth and growth of history, long after it ceased to be strictly poetical, it continued to be dramatic; and many of the incomparable merits of those historians to whom I see many of the students have been introduced by their recent studies, the great historians of the ancient Western world, as for example their painting and analysis of character, are quite as much due in reality to their sense of dramatic propriety as to their love of pure truth. In modern

times, too, many other considerations have had priority over truth. During the last century in France, which then had unquestionably the intellectual headship of Europe, it was a common opinion that history would be of no value unless it illustrated certain general propositions assumed or believed to be proved *à priori*—which is the meaning of the old and in my judgment extremely false commonplace that History is Philosophy teaching by example. The tendency in England, the effect of that interest which is the keenest of all interests in Englishmen, their interest in politics, has been to make historians regard history as pre-eminently an instructress in the art of Government, and specially as charged with illustrating the principles of that branch of the art of which Englishmen are masters, the art of Constitutional Government. Some of this last school of writers have been men of the highest genius and the highest artistic power, and they have at any rate delivered history from one deadly sin against truth, its dulness. But quite recently—certainly within the lifetime of most persons in this room—a manifest dissatisfaction has shown itself with all these schools of history. It is now affirmed, and was felt long before it was affirmed, that the truth of history, if it exists, cannot differ from any other form of truth. If it be truth at all, it must be scientific truth. There can be no essential difference between the truths of

the Astronomer, of the Physiologist, and of the Historian. The great principle which underlies all our knowledge of the physical world, that Nature is ever consistent with herself, must also be true of human nature and of human society which is made up of human nature. It is not indeed meant that there are no truths except of the external world, but that all truth, of whatever character, must conform to the same conditions; so that, if indeed history be true, it must teach that which every other science teaches, continuous sequence, inflexible order, and eternal law.

This brings me to the point to which I was desirous of leading you. Among all our subjects of study, there is no doubt as to which is the one to which belongs the future. The fact is that within the last fifteen or twenty years, there has arisen in the world of thought a new power and a new influence, not the direct but the indirect influence of the physical sciences—of the sciences of experiment and observation. The landmarks between the fields of knowledge are being removed; the methods of cultivation are more than suspected to be the same for all. Already the most surprising results have been achieved by applying scientific modes of inquiry to provinces of study once supposed to be furthest removed from science; and if there is any branch of knowledge which refuses to answer to these new

attempts to improve it, there is a visible disposition to doubt and question its claims to recognition. The transformation which some studies have undergone under the influence of scientific method may be illustrated by one example of the greatest interest to my Native auditors. I suppose that if there was one of all the studies formerly followed with ardour which had fallen into discredit, it was the study of mere words, the inquiry into the mere skeleton of ancient classical languages. It seemed to be regarded as fitted only for pedants, and for quarrelsome pedants too, and was in some danger of being banished to their closets. Yet under the influence of the new methods, even those dry bones have stirred, and to the analysis of language on strictly scientific principles we are indebted for that marvellous discovery which more than any other has roused and excited the educated Native mind in India, the discovery of an identity of origin between all the great races of the world.

I should detain you longer than could be convenient if I were to try to point out the exact degree in which scientific method has influenced other studies which form part of our course. I need not say that nobody ever doubted the real character of mathematical study. Still in England there is a tendency, which requires correction, to exalt pure over mixed mathematics, and I have been told that Native

mathematicians in India strongly exhibit a similar preference. This displacement of the true order of study is often defended at home on the ground that a pure mathematical training encourages accurate habits of thought and reasoning. Now, it is perfectly true that mathematical study, more than any other study, produces habits of sustained thought and attention, without which no great intellectual progress of any kind is possible. But the modes of reasoning followed in mathematics happen to be signally unlike those followed in any other walk of life or province of inquiry, and it would be well, I think, if teachers in India kept steadily before their pupils the truth that, except for the mighty aid they lend to physical science, and except for their value in bracing the faculty of attention, exercises in pure mathematics are as profitless an exercise as writing Latin or Sanscrit verses, without the same beneficial effect on the taste.

In regard to the influence of the new methods on History, the only observation I will make is that their effect has been to change, so to speak, its perspective. Many portions of it which had but small apparent value are exalted into high esteem, just as a stone may be of greater interest to a geologist than a mountain, a weed than a flower to a botanist, a fibre than a whole organism to a physiologist, because they place beyond question a natural law or illustrate

it with extraordinary clearness. One unquestionable effect of the tendency to regard history as a science of observation is to add greatly to the value of ancient, as compared with modern history, and not only to that of the wonderfully precise history of Greece and Rome, but to that of the semi-poetical history of ancient India. Ancient history has for scientific purposes the great advantage over modern, that it is incomparably simpler—simpler because younger. The actions of men, their motives and the movements of society are all infinitely less complex than in the modern world, and better fitted, therefore, to serve as materials for a first generalization.

I know very well that if I were addressing an Oxford or Cambridge audience and if I were to speak of the future as belonging to the sciences of experiment and observation, I should have many objections to answer, some of taste, some of philosophical prejudice, some perhaps of religious feeling. But it is one advantage derivable from having to compare societies so differently constituted as those of England and India, that difficulties which are formidable when the two societies are viewed apart disappear when they are viewed together. Here in India at all events the conditions of truth are plain enough. In the fight which the educated Hindu, which the Christian Missionary, wages against error, such success as has been gained, such as will be gained.

evidently depends on physical knowledge. If the mind of man had been so constituted as to be capable of discovering only moral truths, I should have despaired of its making any permanent conquest of falsehood. Or again—which is much the same thing—if the founders of false systems of religion or philosophy had confined themselves to declaring moral errors only or false propositions concerning the unknown and unseen world, I see no reason for doubting that in most societies, at all events in Oriental societies, their empire would have been perpetual. For, so far from intellectual growth being in itself certain to destroy error, it constantly supplies it with new weapons. We may teach our students to cultivate language, and we only add strength to sophistry; we teach them to cultivate their imagination, and it only gives grace and colour to delusion; we teach them to cultivate their reasoning powers, and they find a thousand resources, in allegory, in analogy, and in mysticism, for evading and discrediting truth. Unchecked by external truth, the mind of man has a fatal facility for ensnaring, and entrapping, and entangling itself. But happily, happily for the human race, some fragment of physical speculation has been built into every false system. Here is the weak point. Its inevitable destruction leaves a breach in the whole

fabric, and through that breach the armies of truth march in.

But I have still another reason for impressing on you the supremacy which I conceive to be reserved for the physical sciences. I think it impossible to say how much the permanence of the instruction of which this University plants the germs depends on the amount of this knowledge we dispense. Of all knowledge, the knowledge of physical laws is the least destructible and the most enduring. No Englishman will admit that there is any probable limit to the continuance of the supremacy of his race in India. But there is one thing which will certainly outlast English power in the East, and that is Nature and her phenomena. If that catastrophe should ever happen, which now seems remote or impossible—if that pent-up flood of barbarism, which the empire of the English race restrains, and only just restrains, were to sweep down as it has so often done on Bengal, and were to destroy that mere fringe of civilization and education which decorates this province, I think it probable that any tincture of physical science we may impart would die out last. Physical truth, it has been justly said, has no advantage over moral truth but one ; it has a tendency to be perpetually re-discovered. But this one advantage is enormous ; so much so that no one natural law ever discovered has been wholly lost sight of, though

the fruitfulness of the discovery has sometimes been suspended for ages. All Nature witnesses to her own laws and is a witness that never can be silenced. The stars in their courses fight for truth, and if physical knowledge retained any foothold here, I should say that the statement would be true which has so often been made in another sense, and India might always be re-conquered from the sea-board of Bengal.

Nobody who shares in that belief which I impressed on a similar audience as the noblest characteristic of that one of the founders of our University who quitted us last year, a belief in the harmony of all truth, will suppose that I have been exalting the truths of physical nature at the expense of moral or any other truths. The very fact which I have been impressing upon you, that the methods of physical science are proving to be applicable to fields of thought where they once had no place, is itself an indication that all truth will, at some time, be shown to be one and indivisible. But no doubt what I have been saying does carry with it the implication that truth of all sorts does admit of intellectual appreciation —that all asserted knowledge must at all events to some extent ring true, when sounded by the intellect But who in India will deny this? Nobody, so far as I know, who ever wished or attempted any good for the people of India—the politician who wished to

attach them to English rule, the administrator who laboured to call out the hidden wealth of their country, the missionary who toiled for their conversion, the philanthropists who founded the education which culminates in this University or who, like a predecessor of mine, sought to carry instruction into the recesses of Native families—none of these ever doubted that the foremost obstacles to success were intellectual errors, and that no instruments blunter than those of the intellect could thrust them aside. A great English writer who well represents part of the spirit of the English Universities, but that part which has most affinity for Oriental habits of thought, wrote the other day of the intellect as an all-dissolving, all-corroding power, before which everything good and great and beautiful was gradually melting and sinking away. The cure for this distortion of view is in India, where every one of us would rather describe the intellect as all-creating and all-renewing, the only known instrument of all moral and of all religious and of all material improvement. But still if intellectual cultivation is to fill the measure of its advantages to India, there is no doubt it should be constantly progressive. I myself attach very little weight to the cavil at Native education which one sometimes hears in this country—that it does nothing but fosters personal conceit and mental scepticism. I suspect the intelligence, and still oftener the motives of these cavillers.

But still it is quite true that conceit and scepticism are the products of an arrested development of knowledge. It is far from impossible that acute minds such as those of the educated Bengalis may come to the point of thinking that every thing is known, and that all that is known is vanity. It is principally because a scientific method of enquiry tends to correct what would be a desolating mistake that I have dwelt on this subject so long. That truth is real and certain, but that truth at the same time is infinite, is the double conviction to which enquiry conducted on scientific principles leads. There can be no manner of question that the progress of knowledge leads to the very frame of mind to which some have thought it fatal — not only to certainty, but to reverence. Whatever be your point of view, you will agree with me that to aim at any consummation short of this could be but a poor result of education by this University.

ADDRESS TO UNIVERSITY OF CALCUTTA.[1]

. . . I AM not going over the ground which was traversed last year, and indeed it is not necessary for me to do so, because the suggestion, that the sphere of physical science in Native education should be enlarged, appears to have been generally assented to. I know it has been said—and it is the only stricture which I have seen, and it is of a somewhat vague character—that this proposal to found education in great part upon physical science is too much in harmony with that material, hard, and unimaginative view of life which is beginning to be common in modern society. I admit that there is some truth in this in its application to Europe and England. But in contrasting England and India, in comparing the East and the West, we must sometimes bring ourselves to call evil good, and good evil. The fact is, that the educated Native mind requires hardening. That culture of the imagination, that tenderness for it, which may be necessary in the West, is out of place here; for this is a society in which, for

[1] Delivered before the Senate in March 1866.

centuries upon centuries, the imagination has run riot, and much of the intellectual weakness and moral evil which afflict it to this moment, may be traced to imagination having so long usurped the place of reason. What the Native mind requires, is stricter criteria of truth ; and I look for the happiest moral and intellectual results from an increased devotion to those sciences by which no tests of truth are accepted, except the most rigid.

The only other event which I have to announce —if I can dignify it with the name of an event—is the advance through another stage of the preparations of our University building. The plans for the building have received full official sanction, and nothing now will probably delay the construction, except those impediments to rapid work which are common to all undertakings in India, whether they be public or private. I greatly regret the delay, and have from year to year stated in this place that I regretted it. But I think it just to say, that it may be explained by a naturally, and indeed, necessarily, imperfect appreciation of the rank which our claim to a building was entitled to hold among the many heavy demands for public works which press upon the Government of India. I do not suppose that anybody ever doubted that the existence of a University without a local habitation was an anomaly, or that we were entitled to a Hall for meetings like this.

But, unless the thing was seen, it was quite impossible to understand what are the difficulties under which, for want of that building, the University labours in discharging the very simplest functions for which it exists. For myself, I confess that, until I was recently present at the Examinations, I could not have conceived the extraordinary meanness of the arrangements provided for holding them—and I know they were the only arrangements which could possibly have been made. But what was more startling than the mere insufficiency of the accommodation—more striking than the fact that we had this year to hold our Examinations in the unfinished shell of the Post Office, and the fact that, if next year we cannot have the unfinished shell of the High Court, we shall be driven to tents on the glacis—what was far more impressive than this, was the amazing contrast betwen the accommodation and the extraordinary importance which these Examinations have acquired. The thing must be seen to be believed. I do not know which was more astonishing, more striking, the multitude of the students, who, if not now, will soon have to be counted not by the hundred, but by the thousand ; or the keenness and eagerness which they displayed. For my part, I do not think anything of the kind has been seen by any European University since the Middle Ages ; and I doubt whether there is anything founded by, or

connected with, the British Government in India which excites so much practical interest in Native households of the better class, from Calcutta to Lahore, as the Examinations of this University.

These are facts, and facts which are insufficiently appreciated in this country, and scarcely at all at home. The truth is that we, the British Government in India, the English in India, have for once in a way founded an institution full of vitality; and by this University and by the other Universities, by the Colleges subordinate to them, and by the Department of Education, we are creating rapidly a multitudinous class, which in the future will be of the most serious importance for good or for evil. And so far as this University is concerned, the success is not the less striking, because it is not exactly the success which was expected. It is perfectly clear, from the language which Lord Canning once employed in this place, in the early days of this University, that the institution, which he expected to come into being, was one which resembled the English Universities more than the University of Calcutta is likely to do for some time to come. Lord Canning's most emphatic words occurred in a passage, in which he said that he hoped the time was near when the nobility and upper classes of India would think that their children had not had the dues of their rank, unless they passed through the course of the University. Now there is no doubt that that view

involved a mistake. The founders of the University of Calcutta thought to create an aristocratic institution; and, in spite of themselves, they have created a popular institution. The fact is so; and we must accept it as a fact, whatever we may think of it. But now, after the fact, now that we are wise by experience, it is not difficult to see that hardly anything else could have occurred. It seems to me utterly idle to expect that, in a virgin field, —in a country new to all real knowledge—in a country in which learning, such as it was, being the close monopoly of a hereditary order, was in exactly the same position as if it did not exist, or existed at the other end of the world—it seems to me idle to expect that the love of learning would begin with the wealthy and the powerful. To suppose this, is to suppose that those who have no acute spur to exertion would voluntarily encounter that which in its first beginnings is the most distasteful of all exercises. Before you can diffuse education, you must create the sense of the value of it; and it is only when the beauty of the results is seen, when their positive and material importance is seen, and they get to be mingled with all the graces of life, that those who can do without knowledge begin to covet and respect it. There is nothing more certain, than that the English Universities in their origin were extremely popular institutions. Even if we could not infer the fact

from the crowds which flocked to them, it would be perfectly plain from the pictures of University life preserved in the poetry of Chaucer, that the early students of Oxford and Cambridge were children of the people. And the object of those students was exactly that which is sometimes imputed to our students, as if a censure was intended. It was simply to get on in life; either to enter the Church which was then the only free field in Europe, or, a little later, to get into one of the clerkly professions that were rising up. But it was the example of the educated classes, the visible effects of education on manners and on material prosperity and its growing importance in politics which first attracted the nobility. Their first step was not to educate themselves. The first sign of interest which they showed was in the munificent endowments which they began to pour in upon learned institutions; and their next step was probably to engage learned men for the education of their children. But it was very slowly, and after much temporary reaction, that that state of things was at last reached, to which Lord Canning pointed, and under which it is undoubtedly true that the English nobility do put their children through the Universities, unless they have chosen a profession inconsistent with Academical training. But nothing could be more erroneous than tc suppose, that even now Oxford and Cambridge are

purely aristocratic institutions. Their endowments are so munificent, and their teaching now-a-days so excellent, that membership in them is profitable, and therefore popular ; and although noblemen do unquestionably compete there on equal terms with others, the condition of such competition is the existence of a class prompted by necessity or ambition to keep the prestige of learning before the eye. Lord Canning himself, no doubt, belonged to a class eminently characteristic of the English Universities. He was a nobleman who worked hard at Oxford, when he might have been idle. But the brilliant and illustrious statesman who was Lord Canning's father belonged to a class even more characteristic of them, a class which, by the lustre it receives from learning and again reflects back on it, stimulates men of Lord Canning's order, men some of whose names are not unknown to India,—Lord Ellenborough, Lord Dalhousie, and Lord Elgin,—to follow its laborious example.

I have admitted that we undoubtedly are creating a class of serious importance to the future of India, and of course the peculiarities and characteristics of that class are objects of fair criticism. One of the criticisms on this University, not uncommonly heard, that it has failed to conciliate the Native nobility, seems to me to be founded on a false estimate of past history, and therefore a false calculation of

probabilities for the future. There are other objections. Some of them I do not purpose to notice, because they are simply vulgar. When, for example, it is said that the Native graduates of this and other Indian Universities are conceited, I wonder whether it is considered how young they are, compared with English graduates, how wide is the difference which their education makes between them and their fellow countrymen, and therefore whether some such result might not to some extent be looked for in any climate or latitude. Certainly, the imputation which is sometimes made, that education saps the morality of the Natives, would be serious if it were true. But, not to speak of its being paradoxical on the face of it, it is against all the evidence that I (or any body else) have been able to collect. At all events, in one department of State, with which I have reason to be acquainted, it is almost a maxim governing promotion that the better educated is a candidate for judicial employment, the less likely is he to be tainted with that corruption which was once the disgrace of the Indian Courts.

But the objection which is commonest, and which most intimately concerns us here, is, that the knowledge communicated by the subordinate Colleges and verified by this University is worthless, shallow, and superficial. The course of the University of Calcutta is sometimes said to be in fault, and it is alleged, to

use a term at once expressive and fashionable, that it encourages 'cramming.' Now there are some things in our Calcutta course, of which I do not altogether approve. But it was settled after long discussion, shortly after I became Vice-Chancellor, and it would be absurd to be perpetually changing that which of all things ought to be fixed and permanent, on account of small defects which are, after all, disputable. I wish, however, to say something of the whole class of objections implied in that one word 'cramming.' If there is anything in them, you know, I suppose, that they have a far wider application than their application to this University. They are constantly urged against the numerous competitive systems which are growing up in England, and in particular against the system under which the Civil Service of India, probably the most powerful official body in the world, is recruited, and will be recruited.

The discredit which has been successfully attached to certain systems by this word is a good illustration of the power of what a famous writer called dyslogistic expression, or, to put it more simply, of giving a thing a bad name. And here I must say, that the habit Englishmen have of importing into India these commonplace censorious opinions about systems and institutions, is a great misfortune for the Natives. Even in the mouths of the Englishmen who invented them, they generally have very little meaning, for

they are based on a mere fragment of truth ; when passed about among the multitude, they have still less; and, at last, when exported hither, and repeated by the Natives in a foreign tongue, they have simply no meaning at all.

As far as I understand the word, it means nothing more than the rapid communication of knowledge,—communication, that is to say, at a rate unknown till recently. Some people, I know, would add something to the definition, and would say that cramming is the rapid communication of superficial knowledge; but the two statements will generally be found to be identical, and that they merely mean by superficial knowledge, knowledge which has been rapidly acquired. The true point, the point which really has to be proved is, whether knowledge rapidly acquired is more easily forgotten than knowledge which has been slowly gained. The point is one upon which, to some extent, everybody can judge for himself or herself. I do not assert the negative, but I am rather surprised at the readiness with which the affirmative has been usually taken for granted; no doubt, if it be true, it is a curious psychological fact, but surely there are some reasons for questioning the reality. It might plausibly be argued that knowledge slowly acquired, has been acquired at the cost of frequent intervals of inattention and forgetfulness. Now everybody knows that inattention and forgetfulness tend to become habits of the

mind, and it might be maintained that these habits would be likely to recur, in association with a subject of thought, even when that subject has for once been successfully mastered. On the other hand, it might be contended that knowledge rapidly acquired has been necessarily acquired under a certain strain and tension of the mental faculties, and that the effects of this tension are not likely to be so readily lost and dissipated.

The simple truth is, that under the strong stimulus applied by that system of examinations by which the entrance to almost every English profession is now barred, there has sprung up an active demand for knowledge of a more varied description than was once coveted, and above all, for knowledge rapidly imbibed and mastered. To meet this demand, a class of teachers has sprung up who certainly produce remarkable results with remarkable rapidity. I hear it said, that they are men of a lower order of mind and accomplishment than the teachers who follow the old methods. It may be so; but that only renders the probability greater, that some new power has been brought into play. I am afraid it must be allowed, that no art, of equal importance to mankind, has been so little investigated scientifically as the art of teaching. No art is in the hands of practitioners who are so apt to follow so blindly in the old paths. I say this with the full recollection that there has been

great improvement in England lately, and that the books of teaching, most in use, have been purged of many gross errors both of statement and of method. But one line of enquiry there is which has never been sufficiently followed, though one would have thought it antecedently the most promising of all,—the study of the human mind through actual observation, and the study of the expedients by which its capacity for receiving and retaining knowledge may be enlarged. The field of investigation has been almost wholly neglected, and therefore it may just be that we are on the eve of great discoveries in education, and that the processes of these teachers are only a rough anticipation of the future. The fact that the methods of teaching followed in England are almost wholly empirical, that for the most part they entirely neglect individual differences of character and temperament, that they certainly work counter to the known laws according to which some of the mental faculties operate,—for example, the memory—all these facts seem to my mind to point at possibilities and chances of improvement, which a few persons, by expedients which, I frankly allow, seem even to me somewhat ignoble, have perhaps had the good fortune to realize beforehand.

You will see, then, that the problem, whether what is called cramming is an unmixed evil, is not yet settled even in England. But, in India, the commonplace imputations against it seem to me

simply without meaning of any kind. There is no proof whatever that Indian teachers follow any special methods of any sort. What appears to be meant is, that Natives of India learn with singular rapidity. The fact may be so, though for my part, I doubt whether they learn with greater rapidity than English lads who once put their hearts into their work and it may be also true, as some allege so positively, that their precocity is compensated by a greater bluntness of the faculties later in life. But be this true or not, it has no sort or kind of connection with the disadvantages of cramming.

If, indeed, a student be taught or teach himself to put on the appearance of knowledge, when he has it not, if he learns to cover ignorance by ambiguous phrases, or to obtain an undue preference by pandering to the known crotchets or fancies of the examiner, the process and the result are alike evil; but they have no bearing on the point I have been discussing. They are simply a fraud; but I must say that the experience of those who know best is, that such frauds succeed, not through any special skill in the teacher, or any fault in the course of examination but through the fault of the examiner. I say, and I say all the more strongly, because I have not the smallest justification for imputing it to the examiners of this University, that no erroneous modes of teaching, no faulty selection of books or subjects, can do

a tenth part of the mischief and injustice entailed by the indulgence of vanity, or crotchettiness, or affectation, or indolence, on the part of the examiners.

If I had any complaint to make of the most highly educated class of Natives,—the class I mean which has received the highest European education, —a class to which our University has hardly as yet contributed many members (because it is too modern), but to which it will certainly make large additions one day—I should assuredly not complain of their mode of acquiring knowledge, or of the quality of that knowledge (except that it is too purely literary and not sufficiently scientific), or of any evil effects it may have on their character, or manners, or habits. I should rather venture to express disappointment at the use to which they sometimes put it. It seems to me that not seldom they employ it for what I can best describe as irrationally reactionary purposes. It is not to be concealed, and I see plainly that educated Natives do not conceal from themselves, that they have, by the fact of their education, broken for ever with much in their history, much in their customs, much in their creed. Yet I constantly read, and sometimes hear, elaborate attempts on their part to persuade themselves and others, that there is a sense in which these rejected portions of Native history, and usage and belief, are perfectly in harmony with the modern knowledge

which the educated class has acquired, and with the modern civilisation to which it aspires. Very possibly, this may be nothing more than a mere literary feat, and a consequence of the over-literary education they receive. But whatever the cause, there can be no greater mistake, and, under the circumstances of this country, no more destructive mistake.

I would not be understood to complain of the romantic light in which educated Hindus sometimes read their past history. It is very difficult for any people to feel self-respect, if they have no pride in their own annals. But this feeling, which I quite admit to be healthy when reasonably indulged, becomes unwholesome, and absurd too, when pushed to the extravagant length to which I sometimes see it driven here. There are some educated Native gentlemen who seem to have persuaded themselves, that there was once a time in India in which learning was more honoured and respected, and when the career of a learned man was more brilliant, than in British India and under British rule. They seem to believe, or they try to believe, that it was better to be a Brahmin or a scribe attached to the Court of some half mythical Hindu king, than to follow one of the prosaic learned professions which the English have created Now thus much is certain. Although there is much in common between the Present and the Past, there is never so much in common as to make life tolerable to

the men of the Present, if they could step back into the Past. There is no one in this room to whom the life of a hundred years since would not be acute suffering, if it could be lived over again. It is impossible even to imagine the condition of an educated Native, with some of the knowledge and many of the susceptibilities of the nineteenth century — indeed, perhaps, with too many of them—if he could recross the immense gulf which separates him from the India of Hindu poetry, if indeed it ever existed. The only India, in fact, to which he could hope to return—and that retrogression is not beyond the range of conceivable possibilities—is the India of Mahratta robbery and Mahomedan rule.

I myself believe that European influences are, in great measure, the source of these delusions. The value attached in Europe to ancient Hindu literature, and deservedly attached for its poetical and philological interest, has very naturally caused the Native to look back with pride and fondness on the era at which the great Sanscrit poems were composed and great philosophical systems evolved. But unquestionably the tendency has its chief root in this,—that the Natives of India have caught from us Europeans our modern trick of constructing, by means of works of fiction, an imaginary Past out of the Present, taking from the Past its externals, its outward furniture, but building in the sympathies, the susceptibilities, and

even (for it sometimes comes to that) the knowledge of the present time. Now this is all very well for us Europeans. It is true that, even with us, it may be that too much of the sloughed skin of the Past hangs about us, and impedes and disorders our movements. At the same time, the activity of social life in Europe is so exuberant, that no serious or sustained disadvantage arises from our pleasing ourselves with pictures of past centuries, more or less unreal and untrue. But, here, the effect of such fictions, and of theories built on such fictions, is unmixedly deleterious. On the educated Native of India, the Past presses with too awful and terrible a power for it to be safe for him to play or palter with it. The clouds which overshadow his household, the doubts which beset his mind, the impotence of progressive advance which he struggles against, are all part of an inheritance of nearly unmixed evil which he has received from the Past. The Past cannot be coloured by him in this way, without his misreading the Present and endangering the Future.

A similar mistake is committed by educated Natives, when they call in ingenious analogies and subtle explanations to justify usages which they do not venture to defend directly, or of which in their hearts they disapprove. I am not now referring to some particularly bad examples of this, though doubtless one does sometimes see educated Native

writers glorifying by fine names things which are simply abominable. But I allude to something less revolting than this. There are Native usages, not in themselves open to heavy moral blame, which every educated man can see to be strongly protective of ignorance and prejudice. I perceive a tendency to defend these, sometimes on the ground that occasionally and incidentally they serve some slight practical use, sometimes because an imaginative explanation of them can be given, sometimes and more often for the reason that something superficially like them can be detected in European society. I admit that this tendency is natural and even inevitable. The only influence which could quite correct it, would be the influence of European ideas conveyed otherwise than through books; in fact through social intercourse. But the social relations between the two races, at least of India, are still in so unsatisfactory a condition, that there is no such thing, or hardly such a thing, as mixed Native and European society. A late colleague of mine, Sir Charles Trevelyan, thought that things in this respect were worse when he was lately here than when he was first here. When he was first here, he saw educated Natives mixing on equal terms with educated Europeans. When he came out a second time to India, there was nothing of the kind. But perhaps that happier state of things was caused by the very smallness of educated Native society. As educated society among Natives has become larger it

has been more independent of European society, more self-sufficing, and as is always the case under such circumstances, its peculiarities and characteristics are determined, in part, by its least advanced sections. I must impress this on you that, in a partnership of that kind, in a partnership between the less and more advanced, it is not the more advanced but the less advanced, not the better but the worse, that gains by glossing over an unjustifiable prejudice, a barbarous custom, or a false opinion. There is no greater delusion than to suppose that you weaken an error by giving it a colour of truth. On the contrary, you give it pertinacity and vitality, and greater power for evil.

I know that what I have been saying can hardly have much significance or force for the actual graduates of this University. There are few of them who can be old enough to be exercising that influence, literary or social, of which I have been speaking, and to which their countrymen are so amenable. But hereafter they may have occasion to recall my observations. If ever it occurs to them that there was once an India in which their lot would have been more brilliant or more honourable than it is now likely to be, let them depend upon it they are mistaken. To be the astrologer, or the poet, or the chronicler of the most heroic of mythical Indian princes (even if we could suppose him existing) would be intolerable

even to a comparatively humble graduate of this University. They may be safely persuaded that, in spite of discouragements which do not all come from themselves or their countrymen, their real affinities are with Europe and the Future, not with India and the Past. They would do well once for all to acquiesce in it, and accept, with all its consequences, the marvellous destiny which has brought one of the youngest branches of the greatest family of mankind from the uttermost ends of the earth to renovate and educate the oldest. There is not yet perfect sympathy between the two, but intellectual sympathy, in part the fruit of this University, will come first, and moral and social sympathy will surely follow afterwards.

THE THEORY OF EVIDENCE.[1]

Among several reasons for the legislative activity which is sometimes attributed to the British Government of India as a distinction, and sometimes as a reproach, the most conclusive of all is one which very generally escapes notice. It is found in the powerful though indirect influence which, in the absence of formal legislation, the law of England exercises on the law of India. If Indian legislation is defended, as I believe that much of it may be, on the ground that it is adjusted to a high standard of equity and expediency, there is the plausible answer that the foreigners who have undertaken to make laws for this vast, strange, and miscellaneous population, are bad judges of what is expedient for it, and possibly not very good judges of what is equitable. This reply might be met in many ways, but the rejoinder which is really conclusive is, that if the Indian Legislature were abolished, legislation would not be arrested. It is not a gratuitous, but an inevitable and never-ceasing process. If (to employ Austin's

[1] (Published, in the 'Fortnightly Review' for January 1873, as a review of Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act.)

phraseology) the commands of the Sovereign are not issued through the special organ called the Legislature, another set of commands will be issued through Courts of Justice; and, so far as regards India, these last commands will, from the nature of the case, scarcely ever even make a pretence of being adjusted to equity or expediency. The obscurity with which what is really a simple truth appears to be apprehended is probably due to our habit of assuming that the common distinction between executive, legislative, and judicial power is absolutely accurate and exhaustive. This famous classification of the forms of power, which, if it did not originate with Montesquieu, is indebted to him for its wide popularity, had doubtless the effect of materially clearing men's ideas when they first became familiar with it, and it has had great influence subsequently on several legislative experiments of the first order of importance, among them on the Constitution of the United States. But the imperfection which lurks in it, and which has been exposed by the searching analysis of Austin, is nowadays a serious impediment to accurate juridical thought, and has among other things stood much in the way of serious inquiry into the exact nature of that process of judicial interpretation or construction which has constantly the practical effect of legislation.

The earlier enactments of the Indian Government

were to a great extent bodies of administrative rules, and formal legislative machinery was for the first time established by the statute 3 and 4 Wm. IV., c. 85, known as the Charter Act of 1833. The laws which have since then been enacted by the new organ of State, for the most part proceeded originally either from the Law Members of Council, who have been able to command very skilful assistance in India, or else from the Indian Law Commission, a body of distinguished English lawyers sitting latterly in London, whom everybody interested in India and conversant with their labours must speak of with the deepest respect and gratitude. But though provision was made by Parliament for Indian legislation in 1833, when Lord Macaulay became Law Member of Council, and though the accumulation of valuable materials for legislation went on for more than twenty years, the Indian Legislature did not become active until 1859, 1860, and 1861, when, under the influence of Sir Barnes Peacock, it passed the Penal Code and the Codes of Civil and Criminal Procedure. There had therefore been plenty of time for the law of India to be acted upon by the other kind of legislation, the legislation of courts of justice; and the results were most instructive. The civil law of the country, when the English first undertook its systematic adminis tration, had in certain departments been extremely full of rules laid down by some kind of authority,

though the authorities constantly contradicted one another, and the rules themselves were stated with extreme looseness. There was, for example, a very copious law of Succession after Death. The most distinct effect of continued judicial construction on provinces of law which were in this state has been, as I have attempted to show in a recent work ('Village-Communities in the East and West,' *ante*, pp. 51 *et seq.*), greatly to extend the operation of semi-sacred collections of written rules, such as the treatises of Mahometan doctors, or of the Brahminical commentators on Manu, at the expense of local customs which had been practised over small territorial areas. But there were many branches of law in which the political officers of the British Government could find few positive rules of any sort; or, if any could be discovered, they were the special observances of limited classes or castes. Thus there was no law of Evidence, in the proper sense of the words; hardly any law of Contract; scarcely any of Civil Wrong. The civil procedure, so far as it was authoritatively prescribed, consisted in little more than vague directions to do justice. The criminal law of the Hindus, such as it was, had been entirely superseded by the semi-military system of the Mahometans. Into all the departments of law which were thus scantily filled the English law steadily made its way, in quantities nearly proportioned to the original barrenness of each of them. The

higher courts, while they openly borrowed the English rules from the recognised English authorities, constantly used language which implied that they believed themselves to be taking them from some abstract body of legal principle which lay behind all law; and the inferior judges, when they were applying some half-remembered legal rule learnt in boyhood, or culling a proposition of law from a half-understood English text-book, no doubt honestly thought in many cases that they were following the rule prescribed for them, to decide 'by equity and good conscience' wherever no Native law or usage was discoverable. The result, however, of the process is plain upon simple observation. Whole provinces of law became exclusively, or nearly exclusively, English. The law of Evidence became wholly English; so did the law of Contract substantially; so did the law of Tort. The procedure of the civil courts became a close reproduction of the procedure of the Court of Chancery in its worst days. In the parts of law less universally affected by English law, the infusion of English principles and distinctions was still very considerable. I do not think that there is any reason to apply harsh language to this great revolution; for revolution it assuredly was, little as it was intended or even perceived. It was quite inevitable in the absence of formal legislation; for the indirect effect of English government was, from the first

enormously to quicken the springs of social activity, principally by breaking up that common life of families and communities by which they had been retarded. All sorts of new questions were raised, and moot points started in civil affairs; and when principles were required for the settlement of the resulting controversies, they were necessarily taken from English law, for, under the circumstances, they could be found nowhere else. The points which require to be observed are—first, that the true revolutionary agent in India has been neither the Executive Government nor the Legislature, but the Court of Justice, without which the existence of British rule in India can hardly be conceived; and secondly, that the only possible corrective of the process of change is formal legislation. It is quite possible to hold a respectful opinion of many parts of English law, and yet to affirm strongly that its introduction by courts of justice into India has amounted to a grievous wrong. The English law is a system of colossal dimensions. The community which immediately obeys it has ceased to profess to be acquainted with it, and consents to be dependent for knowledge of it on various classes of experts. These experts do not affect to practise their art without access to law libraries, consisting when complete of many thousand volumes. Now, there are probably half-a-dozen law-libraries at most in all India. The books they contain are written in a foreign language, and the persons able to consult these books and

to use them properly are extremely few, and collected at one or two points of Indian territory very remote from one another. And at length, when the law has been elicited, it is necessarily law brought into existence by a highly artificial process for a remote community, extremely unlike the natives of India. The system which Indian legislation was gradually superseding was, in fact, one under which all really important influence was steadily falling into the hands of a very small minority of lawyers trained in England, whose knowledge must have seemed to the millions affected by it hardly less mysterious and hardly more explicable than the inspired utterances of Mahomet or Manu. Not very long ago, an English judge stated from an Indian bench that he was reluctant to give judgment in an important suit, because the opinion of the Exchequer Chamber reviewing a particular decision of the Common Pleas was expected to arrive by the next mail; and the Native practitioner who repeated to me the statement certainly seemed to me to be under the impression that his case was to be decided by a supernatural intervention.

No branch of law had become more thoroughly English at the time when it was first comprehensively dealt with by the Indian Legislature than the law of Evidence; and the practical evils which hence arose were even greater than those which ordinarily result from the adoption of an exotic system of legal rules,

collected with difficulty from isolated decisions reported in a foreign language. The theory of judicial evidence is constantly misstated or misconceived even in this country, and the English law on the subject is too often described as being that which it is its chief distinction not to be—that is, as an Organon, as a sort of contrivance for the discovery of truth which English lawyers have patented. In India, several special causes have contributed to disguise its true character. There is much probability that our English law of Evidence would never have come into existence if we had not continued much longer than other Western societies the separation of the province of the judge from the province of the jury; and, in fact, the English rules of evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure. Now, an Indian functionary, when he acts as a civil judge, and for the most part when he acts as a criminal judge, decides both on law and on fact. He it is who applies the rules of evidence to himself, and not to a body distinct from himself, and he has often to perform the delicate achievement of preventing his decision from being affected by sources of information which in reality have been opened to him. Nor is this all. The civil servant of the Indian Government is, through much of his career, an administrative officer, and, indeed, his duties are

sometimes at the same moment both administrative and judicial. Thus, until quite recently, the Magistrate of the District who exercises important criminal jurisdiction was invariably the head of the police; and, in the discharge of this last class of functions, he would lay himself open to severe censure if he neglected some sources of knowledge which the English law of Evidence would compel him to disregard. It may thus happen that facts of precisely the same kind may have to be taken into serious consideration by an Indian civil servant during one part of his career under penalty of rebuke from the Lieutenant-Governor, while during another he may have to avert his attention from them under penalty of censure from the High Court. It is, of course, possible to explain the apparent paradox; but the effects of their peculiar experience on many distinguished Indian functionaries may be seen to be of two kinds. In some minds there is complete scepticism as to the value of the rules of evidence; and though the man who for the time being is a judge may attempt to apply them, he is intimately persuaded that he has gone into bondage to a foolish technical system under compulsion from the Court of Appeal above him With others the consequences are of a different sort, but practically much more serious. They accept from the lawyers the doctrine that the law of Evidence is of the extremest importance, and unconsciously allow

this belief to influence them, not only in their judicial, but in their executive and administrative duties. It is often said in India that the servile reliance upon the English law of Evidence which nowadays characterises many of the servants of Government, is producing a paralysis of administration; and though the assertion may be exaggerated, it is far from impossible that it may have a basis of truth. I have myself heard an eminent English Common Law judge observe that, in the exercise of the new jurisdiction on election petitions, he had to maintain a constant struggle with his own habits of mind to preserve his common sense when adjudicating on facts without a jury, and to keep himself from dealing with them exactly as he would have done at Nisi Prius.

Two things were indispensable for the correction of these evils. One was to alleviate the labour of mastering the law of Evidence, whatever form it might take, and, so far as might be possible, to place the civil servant overwhelmed by multifarious duties, the native judge, and the native practitioner on a level with the English lawyers of the Presidency towns, who have hitherto virtually claimed a monopoly of knowledge on the subject—a monopoly which the great mass of British settlers in India have been eager to concede to them for political reasons not necessary to discuss here. The Indian Evidence Act has been framed and enacted with this object. It may be

described as the joint result of the labours of Mr. Fitzjames Stephen, lately Law Member of Council, and of the Indian Law Commissioners; but the methods of statement and arrangement which are its distinctive characteristic, and of which I shall have to speak presently, are almost exclusively attributable to Mr. Stephen. He has claimed for it that it sets forth, in explicit and compendious language, within the limits of 167 sections, every single proposition of law having any application to India which is contained in 'Taylor on Evidence,' one of the longest law books ever published. There was, however, yet another thing to be done which, in my judgment, was of scarcely less importance than the express declaration of the law. This was to dispel the erroneous and, under the circumstances of the country, highly dangerous ideas which are prevalent in India as to the character and functions of a law of Evidence. Mr. Stephen, in publishing an edition of the Evidence Act, has prefixed to it an Introduction, in which he propounds a theory of judicial evidence which seems to me more nearly correct than any hitherto given to the world by a lawyer.

Some not inconsiderable impediments to the establishment of a tenable theory of judicial proof are removed by the Indian Evidence Act itself. It entirely abandons the ambiguous term 'hearsay,' and it confines the expression 'evidence' to the actual

media of proof, to 'statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry,' and to 'documents produced for the inspection of the Court.' The improvement in phraseology thus effected is of much value. English lawyers are in the habit of using the one name 'evidence' for the fact to be proved, as well as for the means by which it is to be proved, and thus many of the fundamental expressions of the English law of Evidence have undoubtedly contracted a double meaning. The employment of 'primary evidence' sometimes to indicate a relevant fact, and sometimes to signify the original of a document as opposed to a copy, may not be of much practical importance, but the ambiguity in the opposition commonly set up between 'circumstantial evidence' and 'direct evidence' is really serious. 'Circumstantial evidence' is ordinarily used to signify a fact, from which some other fact is inferred; 'direct evidence' means a man's testimony as to that which he has perceived by his own senses. In the first phrase, therefore, 'evidence' means a relevant fact of a particular kind; in the second, it means a particular mode of proving a fact. Mr. Stephen justly remarks that this clumsiness of expression is the source of the vulgar but most dangerous error which assumes that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and

that they must be adjusted to different conditions before they can be allowed to convince a court of justice. At the same time, the practical inconveniences arising from these ambiguities must not be overrated. The sagacity of English lawyers supplies the proper corrections in forensic practice, and, as Mr. Stephen observes, it is even convenient for popular and general purposes to have a word which includes the testimony on which a given set of facts is believed, the facts so believed, and the arguments founded upon them. All these meanings attach to the word in the title of 'Paley's Evidences of Christianity,' and, regard being had to the nature of the work, the complexity of sense is comparatively harmless. Similarly, in scientific inquiries, the use of the same word for a fact, and for the testimony on which it is believed, is seldom important. It is only in judicial investigations that the distinction must be carefully maintained and kept in view, and in them for two reasons. First, if it be not observed, the whole theory of judicial proof is obscured; and next, an obscure theory produces erroneous legislative classification.

The Indian Evidence Act further brings into clear light the important truth that there are only two classes of facts with which, in any event, courts of justice can be concerned, and of which the existence or non-existence has to be established before them by

evidence. These classes of facts are styled respectively by the Act, 'facts in issue' and 'relevant facts.' 'Facts in issue' are the fact or group of facts to which, if its existence be proved, the substantive law of a given community attaches a definite legal consequence, generally an obligation or a right. Thus, in a litigation concerning lands in England, the fact that A is the eldest son of B may be in issue; if it be proved, there arises the inference under the law of England that A is the Heir-at-Law of B, and has the rights involved in that status. If, again, A proffers a promise to B, and B accepts it, and the understanding between them be reduced to writing with certain formalities, the result of these facts—if either undisputed or established by evidence—is a Contract under Seal, to which the law annexes a definite set of legal consequences. But there are other facts, besides the facts in issue, which may have to be proved before a court of justice. These are facts which affect the probability of 'facts in issue,' or, to put it otherwise, have the capacity for furnishing an inference respecting them. Facts which possess such a capacity are called in the Evidence Act 'relevant facts.' Let us suppose that A has been shot, and it is alleged that he was shot by B with a particular intention or state of mind. The first fact being undisputed, the second, the homicide by B, and the third, B's intention—which is a 'fact' under the

definitions of the Evidence Act—are facts in issue, and, if they be established, certain known legal consequences follow from them. But there are certain other facts which can be proved by the testimony of witnesses. It can be shown that B absconded shortly after the homicide; that footprints near its scene correspond with shoes found in B's possession; that shortly before its occurrence B bought a pistol; that blood-stains could be discerned on his clothes; that he made statements to certain persons concerning the mode of A's death; that he made statements on the same subject to persons not forthcoming, who repeated them to others. To this last fact the law of England and the Indian Evidence Act deny the quality of relevancy; but the other facts are relevant, and the business of the Judge of Fact is, first of all, to assure himself that they are proved, and next from all, or some of them, or other facts of the same class, to infer the existence or non-existence of the facts in issue.

The problem of judicial investigation is thus, in great part, the problem of relevancy. It is concerned with the relations between facts considered as antecedents and consequents, as cause and effect; and a correct theory of judicial inquiry would be one which should set forth the principles upon which, and the methods by which, problems of this description can be successfully solved. Such problems would differ

in no essential respect from the problems of scientific inquiry, and, like them, would consist in a process of inferring unknown causes from known effects. Mr. Huxley has observed that the methods of science are not distinguished from the methods which we all habitually, though carelessly, employ in investigating the facts of common life, and that the faculties and processes by which Adams and Leverrier discovered a new planet, and Cuvier restored the extinct animals of Montmartre, are identical with those by which a policeman detects a burglar, or a lady infers the upsetting of an inkstand from a stain on her dress. Mr. Stephen justly affirms that Mr. Huxley's remarks admit of an inverse application, and urges the importance of understanding that the investigation of matters of every-day occurrence, which is the business of the judge (and, I may add, of the historian), is conducted, when it is properly conducted, according to the methods of science. The most general rules which can be laid down with respect to judicial inquiry are those which belong to the Logic of Facts as set forth by Mr. John Stuart Mill. Mr. Stephen, who writes in part for beginners, has abstracted in his Introduction Mr. Mill's account of Induction and Deduction, and specially of the inductive methods of Agreement and Difference. After illustrating the application of Mr. Mill's principles to judicial inquiries, he adds some observations of his own, which

seem to me very important, on the comparative advantages and disadvantages of the judge, and of the scientific investigator of the facts of nature. The greatest of all the advantages which attend inquiries into physical nature is no doubt the possibility of indefinitely multiplying relevant facts, since there is no practical limit to the number of experiments which can be tried. But, on the other hand, this great resource is denied to the judge and the historian, who, in reference to isolated events, can seldom or never perform experiments, but are confined to a fixed number of relevant facts which cannot be increased. Again, the judge is placed under a peculiar disadvantage as compared both with the scientific experimentalist and with the historian, by the necessary urgency of his duties. He must arrive at a solution promptly, and thus the suspension of judgment which belongs to the duties of the scientific inquirer is impracticable to him, and his standard of certainty is proportionately lower. Finally, a vast advantage over the judge is enjoyed by those who conduct scientific inquiries in the much greater trustworthiness of the evidence brought before them, so far as they have occasion to depend upon evidence. The statements of fact reported by a scientific observer are hardly ever influenced by his passions, and are always controlled by his knowledge that his observations will be confronted with those of others,

and will be combined with those of others before any inference is drawn from them. More than all, the evidence of a scientific witness is not taken at all unless his powers of observation are known to have been tested, and the facts to which he speaks are for the most part simple and ascertained through special contrivances provided for the purpose. No one of these securities for accuracy exists in the case of a witness in a court of justice. He is rarely a man of trained observation. His passions are often strongly enlisted in favour of one view of the question to be decided. He has the power of shaping his evidence so as to make it suggest the conclusion he desires. Much of what he states is safe from contradiction, and the facts to which he deposes, being portions of human conduct, are constantly in the highest degree intricate.

Up to this point the advantage is wholly on the side of the scientific inquirer. But Mr. Stephen has some acute observations on some special facilities which materially assist those who are engaged in judicial investigations. The rules by which such persons guide themselves are founded on propositions concerning human nature which are only approximately true; these rules are stated with little precision, and must be constantly qualified before they are applied. But then they are of much greater practical use than would be rough generalisations concerning

physical nature, because everybody has a stock of personal experience by which he can correct them. This may be illustrated by comparing the proposition that 'heavy bodies fall to the ground' (which is a rough generalisation concerning physical nature) with the proposition that 'the possessor of stolen goods is the thief' (which is a rough generalisation concerning human conduct). It is not everybody who understands what bearing on the first rule has the apparent exception of a balloon ascending, but everybody appreciates the exception to the second rule, which arises when stolen coin is found in the till of a shopkeeper doing a large business. Lastly, the inquiry 'whether an isolated fact exists, is a far simpler problem than to ascertain and prove the rule according to which facts of a given class happen. The inquiry falls within a smaller compass. The process is generally deductive. The deductions depend upon previous inductions of which the truth is generally recognised, and which generally share in the advantage of appealing directly to the personal experience and sympathy of the judge. The deductions, too, are, as a rule, of various kinds, and so cross and check each other, and supply each other's deficiencies.'

A true theory of judicial inquiry is essentially the same as a true theory of scientific investigation, but it does not at all follow that a good law of evidence

would cover the whole of the field covered by a perfect theory of judicial inference. As Mr. Stephen has said, all facts of every sort, material and moral, may for all we know be connected together as antecedents and consequents, and a supernatural intelligence might perhaps safely infer any one fact from any other. But a Law of Evidence is necessarily limited by practical experience of human nature and conduct, and a good law of the kind, by its general or particular descriptions of relevant facts, ought not to admit any fact whose capacity for supplying a safe inference has been shown by experience to be dangerously slight; nor ought it, on the other hand, by over-strict or narrow definitions, to exclude any fact of a class upon which sound inferences are found to be practically based in the commerce of life. What are the merits, in this respect, of the English Law of Evidence—the part of our law which has been most indiscriminately praised, and at some periods of its history most bitterly attacked—is much more easily seen in the Indian Evidence Act than in compendia of older date. The Indian measure may be described as setting forth the rules of our law affirmatively instead of negatively. The ordinary text-books of the law of evidence, adopting the language of judicial decision, represent the law as in principle a system of exclusion. They place in front of it one or two broad general rules, shutting out testimony of a certain

kind, and in particular the famous rule which, as vulgarly stated, affirms the inadmissibility of 'hearsay' evidence, or which, in the phraseology of the Indian law, denies the relevancy of statements made by a witness not of his own knowledge, but on the information of others. The bulk of the rules permitting testimony of certain kinds to be received are then stated as exceptions to some dominant rule of exclusion. It is to be expected that if a Digest (as the term is now understood) were framed of the English law of evidence, it would adopt this arrangement. But the Indian Evidence Act, which is a good example of a Code as opposed to a Digest, keeps its negative rules, or rules of exclusion, in the background. It begins by declaring that 'evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others;' and then it proceeds to set forth affirmatively the canons for testing and determining the relevancy of facts — their capacity, that is to say, for furnishing an inference. The advantages of the arrangement are manifold. In the first place, it makes the law of evidence much more easily understood by the student or layman, for nothing in practice helps so much to keep this body of rules an exclusive possession of experts as the negative mode of statement followed in the ordinary treatises. Next, it

unquestionably brings into much clearer light the true merits of the English law of evidence. That law in former times contained several absurd rules of arbitrary exclusion, or, as it might be put, it irrationally denied the relevancy of certain classes of facts; but subject to these drawbacks, it always included the general rule that the facts in issue, and all facts from which they might be inferred, might be proved; and the existence of this great positive rule, which is no where expressly declared by the English authorities, plainly appears through the arrangement of the Evidence Act. The nature, too, of the minor rules, which are usually stated as exceptions to dominant rules of exclusion, but which here affirm the relevancy of facts of a particular kind, is much more distinctly shown, and the impression which they make is extremely favourable to them. All these rules are founded on propositions concerning human nature and conduct which are approximately or roughly true. Such propositions are established inductively in order that they may be employed deductively in judicial inquiries. When we carefully examine such of them as are at the base of the English rules, and of the limitations and exceptions to which these rules are subject, we find the strongest reason for admiring the sagacity of the English lawyers who matured and framed them. It is quite true that, but for the influence of Bentham, they would still be intermixed with

and qualified by others of much more than doubtful wisdom; but when all allowance has been made for the statutory reforms of the law of evidence ultimately attributable to Bentham, there remains quite enough to give an exalted idea of the knowledge of human nature, and specially of English human nature, which has characterized so many generations of judicial legislators. Lastly, I think that the method of the Evidence Act greatly facilitates the comparison of the English law of evidence with other bodies of rules which are in *pari materiâ*, and thus enables us to see what the English law is not. It is seen to be very different from those barren legal systems which are almost entirely occupied with questions of what English lawyers call primary and secondary evidence. It is very superior to others which are full of arbitrary presumptions, based upon premature, imperfect, or erroneous generalisations about facts and conduct. Finally, it has a special excellence in laying down no rules at all on certain branches of judicial inquiry. It does not affect to provide the Judge of Fact with rules to guide him in drawing inferences from the assertion of a witness to the existence of the facts asserted by him. Mr. Stephen, in his Introduction, strongly insists on the difficulty of this process, and vehemently contends against the vulgar belief that it is a simpler thing to infer the reality of a fact from an assertion of its reality, than to infer one

fact from another which has been proved beyond dispute. It is in the passage from the statements of the witnesses to the inference that those statements are true, that judicial inquiries generally break down. The English procedure of examination and cross-examination is doubtless entitled to the highest praise; but, on the whole, it is the rarest and highest personal accomplishment of a judge to make allowance for the ignorance or timidity of witnesses, and to see through the confident and plausible liar. Nor can any general rules be laid down for the acquisition of this power, which has methods of operation peculiar to itself, and almost undefinable. I have heard barristers in India assert—and Mr. Stephen tells the same story of a barrister in Ceylon—that they knew Native witnesses to be perjuring themselves whenever their toes begin to twitch, and, country for country, the tests which English judges and counsel have taught themselves to apply with practical success are hardly less singular. But the caution of the English law in avoiding express rules concerning this particular process of inference has not always been displayed by the legal systems of other countries, or always appreciated by speculative juridical critics in our own. Some elaborate attempts to connect the accumulation of testimony with the theory of proba bilities have proceeded from the very mistake which the English law has escaped; and the error is at the

root of all rules for definitely graduating the approach to a valid conclusion according to the number of witnesses who have deposed to the existence of a particular fact or group of facts.

At the same time, it must always be recollected that the affirmative or positive method of arrangement followed in the Indian Evidence Act does not represent the historical growth of the English law of Evidence. So far as it consisted of express rules, it was in its origin a pure system of exclusion, and the great bulk of its present rules were gradually developed as exceptions to rules of the widest application, which prevented large classes of testimony from being submitted to the jury. The chief of these were founded on general propositions of which the approximation to truth was but remote. Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed; that witnesses interested in the subject-matter of the suit were not credible; and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men. The vigorous attacks of Bentham on the technical rules which had the first two propositions for their foundation have caused them to be removed from our law; but the rule based on the third—the rule commonly described as the rule against the admissibility of hearsay evidence—still holds its ground. Much the

largest part of the law of evidence has grown up, so to speak, under the shadow of this great rule of exclusion, and consists of exceptions to it matured and stated with a caution which is the true secret of the value which this branch of law undoubtedly possesses. A complete account of it cannot in fact be given, unless the mode of its development be kept in view. We could not otherwise, for example, explain the disproportion between its component parts. We find in the Indian Evidence Act a few permissive rules of the widest application, and by their side a multitude of minor rules, of which some relate to matters which are almost trivial. A rule declaring the relevancy of commercial accounts kept in a particular way, is grouped with such a rule as affirms the relevancy of 'facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction.' It would be impossible to understand the number of carefully limited, but very minute, permissive rules, without reference to their origin in a rule of exclusion; and, indeed, it is morally certain that if the English lawyers, instead of slowly framing exceptions to rules shutting out testimony, had set themselves to lay down a series of affirmative propositions as to the classes of facts from which inferences can be

safely drawn, they would have created a body of rules very different from the existing law, and, in all probability, infinitely less valuable. Another important reason, too, for remembering that our law of evidence is historically a system of exclusion, is that we cannot in any other way account for its occasional miscarriages. The conditions under which it was originally developed must still be referred to, in explanation of the difficulty of applying it in certain cases, or of the ill success which attends the attempt to apply it. The mechanism of judicial administration which once extended over a great part of Europe, and in which the functions of the judge were distributed between persons or bodies representing distinct sources of authority—the King and the country, or the Lord and his tenants—in England gradually assumed the shape under which we are all familiar with it in criminal trials and at Nisi Prius. A body of men, whose award on questions of fact is in the last resort conclusive, are instructed and guided to a decision by a dignitary, sitting in their presence, who is assumed to have an eminent acquaintance with the principles of human conduct, whether embodied or not in technical rules, and who is sole judge of points of law, and of the admissibility of evidence. The system of technical rules which this procedure carries with it fails then, in the first place, whenever the arbiter of facts —the person who has to draw inferences from or

about them—has special qualifications for deciding on them, supplied to him by experience, study, or the peculiarities of his own character, which are of more value to him than could be any general direction from book or person. For this reason, a policeman guiding himself by the strict rules of evidence would be chargeable with incapacity, and a general would be guilty of a military crime. Again, the blending of the duties of the judge of law and of the judge of fact deprives the system of much, though not necessarily of all, of its utility. An Equity judge, an Admiralty judge, a Common Law judge trying an election petition, an historian, may employ the English rules of evidence, particularly when stated affirmatively, to steady and sober his judgment, but he cannot give general directions to his own mind without running much risk of entangling or enfeebling it, and, under the existing conditions of thought, he cannot really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it. Englishmen are extremely prone to do injustice to foreign systems of judicial administration, from forgetting the inherent difficulty of applying the English law of evidence, when the same authority decides both on law and on fact, as is mostly the case in other countries. The evidence permitted to be placed before a French jury has often furnished English lawyers with matter for surprise or merriment. But the jury is a mere

modern excrescence on French criminal procedure It still works clumsily and very much at haphazard. French judges and lawyers are entitled to have their aptitudes tested by their method of dealing with civil cases, in which the same Court which settles points of law decides questions of fact ; and there the special skill and acquired sagacity which are applied to facts, though very slightly controlled by a law of evidence, lead, I believe, to a sound decision just as often as the equivalent accomplishments of our own judges.

The value to India itself, not of the Evidence Act, but of the system of rules included in it, is a rather complex question. I have no doubt whatever that the Indian Law Commissioners and Mr. Stephen were wise in legislatively declaring the law of evidence, as they found it nominally prevailing throughout India —that is, as a body of rules not distinguishable from those of English law. Their measure has, in fact, for the first time, put this law into a state which admits of its operation being accurately observed and tested. But it may be suspected that, after more experience of its working has been gained by the servants of the Indian Government, who will henceforward be universally familiar with it, a certain number of its rules will be found, so far as India is concerned, to require modification. The reasons for this opinion may be thus stated. The rules of evidence are founded on propositions concerning human nature and conduct

which are approximately true. When, however, we are transferring a system from England to a country so far removed from it, morally and mentally, as India, we cannot be quite sure that all the propositions which are roughly true of one people and one state of society are in the same degree true of another people and another social state. Still less can we be sure that the relative truth of rules founded on propositions of this sort is the same in the two countries. Mr. Stephen, as I have said, strongly contends that one of the most difficult processes which the judicial mind has to go through is the inference from the fact of a witness's assertion to the existence of the fact asserted by him; but still, though the principle is from the nature of the case nowhere expressly laid down, it would be unreasonable to doubt that witnesses in England very generally speak the truth, and the assumption that they do speak it is perpetually acted upon. On the other hand, the statements of a person who is not called as a witness are, subject to exceptions, inexorably excluded by English law. It is, therefore, considered in this country, and it is probably true, that a fact deposed to by a witness in court is more likely to exist than a fact reported at second-hand. But it is a great deal more than doubtful whether this assertion can be confidently made of India. The inference from the statement of a witness to the truth of the statement, which is not

always secure here, is there in the highest degree unsafe. The timidity of the people; their training during childhood in households in which veracity is said to be scarcely recognised as a virtue; the strange casuistry of their religious literature, which excuses false speaking and swearing in the interests of the higher castes; possibly (as some say) their dramatic instinct, which leads them to confound truth with verisimilitude; more than all (as is generally believed), the disinclination of the English to sanction the grotesque and superstitious oaths which the natives employ among themselves—all these causes contribute to produce the very general worthlessness of native testimony. Fortunately the evil is diminishing. It is no mere comfortable commonplace, but a fact established by abundant observation, that the practice of truth-speaking diffuses itself with the spread of education, and it is beginning to be true, with the exceptions to be found in all countries, that an educated Native of India either will not lie or will feel acutely the shame of being detected in lying. But, nevertheless, strong distrust is still felt by Indian Courts of much or most of the direct testimony presented to them, and hence they are apt to attach very great weight to relevant facts established beyond dispute, which in this country would be regarded as of minor importance and significance. There is, therefore, considerable danger lest too narrow canons

of relevancy should, in virtue of principles admitted to be at best only roughly true, occasionally forbid an Indian Court to take into account facts which furnish inferences a great deal safer than all the evidence which the law unhesitatingly lets in. I myself have known a heavy mercantile suit to be tried by a judge who was intimately persuaded that the witnesses on each side were telling a concerted story in which there was a large element of falsehood; but what was its amount, the facts before the Court did not enable him to decide. It was known, however, that a person of good repute had made a statement concerning the matter in dispute under perfectly unsuspicious circumstances, which would have decided the case; but he was shown to be alive, and he was not called as a witness. The theory of the law was that, as he was in a foreign country, a commission should issue for his examination. The fact was that he had settled as a religious ascetic in Bokhara, and in Bokhara as it was before the Russian advance in Central Asia! I imagine, therefore, that the more general application of the rules of evidence which will follow the enactment of the Evidence Act is extremely likely to lead to still further relaxations of the so-called rule against 'hearsay,' as required under the special circumstances of India. Nor do I suppose that Mr. Stephen is of a very different opinion. He introduced into the Evidence Act a peculiar provision (sect. 165), under

which an Indian judge is empowered, for the purpose of obtaining proof of 'relevant' facts, to ask questions even concerning 'irrelevant' facts, or in other words, facts not falling under the definitions of relevancy; nor can any objection be taken to these questions. I have heard this power described by a person incredulous of the value of the English system of evidence as nothing less than its *reductio ad absurdum.* And, indeed, if the liberty of receiving testimony technically irrelevant were to be very largely and universally employed in India, there might be some justice in the charge. But I take the provision as intended, so to speak, to ease off the law of evidence, which will now be at everybody's command, until the practical results of its general application in India have been sufficiently observed. So understood, the expedient seems to be prudent and ingenious. Meanwhile, the rules of evidence will be binding on contending litigants and on their advocates, while they will doubtless be generally obeyed by the judge, and will in any event exercise a steadying and sobering influence on his mind.

It does not fall within the scope of this paper to inquire whether the English Law of Evidence has had any, and what, effect on English methods and habits of thought. But I have no doubt that the effect has been considerable. In our day, the great chastener and corrector of all investigation and of

the whole business of inference from the known to the unknown, is scientific inquiry into the facts of nature; but though its influence, great already, is destined to be much greater, it is altogether modern. Englishmen have for long had, not indeed an adequate, but a valuable substitute for it in their law of evidence. I do not deny that they in some degree owe this advantage to an accident. The early rules of exclusion adopted by our law, though founded on views of human conduct which contained a considerable amount of truth, were soon seen to require limitation if they were to be brought into still further harmony with human nature; and thus the great practical sagacity which has always distinguished English lawyers came to be employed on the modification of these rules—always, however, restrained and sobered by their veneration for dominant principles long since judicially declared. The system evolved had many defects, some of which have been removed; but even in its unimproved state it produced a certain severity of judgment on questions of fact which has long been a healthy characteristic of the English mind. The experience of any observant person will probably supply him with instances in point; but I take a less familiar example in the specially English school of history. It has certainly been strongly affected by canons of evidence having their origin in the law. Nobody can doubt that the peculiarities thus produced

are those which distinguish Hallam, Grote, Lewis, and Freeman from the bulk of French or German historians; and for this reason alone we may respect the principle, dear to English lawyers, which in their own language runs, 'Hearsay is no Evidence.'

ROMAN LAW AND LEGAL EDUCATION.[1]

If it were worth our while to inquire narrowly into the causes which have led of late years to the revival of interest in the Roman civil law, we should probably end in attributing its increasing popularity rather to some incidental glimpses of its value which have been gained by the English practitioner in the course of legal business, than to any widely diffused or far-reaching appreciation of its importance as an instrument of knowledge. It is most certain that the higher the point of jurisprudence which has to be dealt with, the more signal is always the assistance derived by the English lawyer from Roman law; and the higher the mind employed upon the question, the more unqualified is its admiration of the system by which its perplexities have been disentangled. But the grounds upon which the study of Roman jurisprudence is to be defended are by no means such as to be intelligible only to the subtlest intellects, nor do they await the occurrence of recondite points of law in order to disclose themselves. It is believed

[1] (Published in the Cambridge Essays for 1856.)

that the soundness of many of them will be recognised as soon as they are stated, and to these it is proposed to call attention in the present Essay.

The historical connexion between the Roman jurisprudence and our own, appears to be now looked upon as furnishing one very strong reason for increased attention to the civil law of Rome. The fact, of course, is not now to be questioned. The vulgar belief that the English Common Law was indigenous in all its parts was always so easily refuted by the most superficial comparison of the text of Bracton and Fleta with the *Corpus Juris*, that the honesty of the historians who countenanced it can only be defended by alleging the violence of their prejudices; and now that the great accumulation of fragments of ante-Justinianean compendia, and the discovery of the MS. of Gaius, have increased our acquaintance with the Roman law in the only form in which it can have penetrated into Britain, the suspicion of a partial earlier filiation amounts almost to a certainty. The fact of such a filiation has necessarily the highest interest for the legal antiquarian, and it is of value besides for its effect on some of the coarser prepossessions of English lawyers. But too much importance should not be attached to it. It has ever been the case in England that every intellectual importation we have received has been instantly coloured by the peculiarities of our national habits and spirit. A

foreign jurisprudence interpreted by the old English common-lawyers would soon cease to be foreign, and the Roman law would lose its distinctive character with even greater rapidity than any other set of institutions. It will be easily understood that a system like the laws of Rome, distinguished above all others for its symmetry and its close correspondence with fundamental rules, would be effectually metamorphosed by a very slight distortion of its parts, or by the omission of one or two governing principles. Even though, therefore, it be true—and true it certainly is—that texts of Roman law have been worked at all points into the foundations of our jurisprudence, it does not follow, from that fact, that our knowledge of English law would be materially improved by the study of the *Corpus Juris* ; and besides, if too much stress be laid on the historical connexion between the systems, it will be apt to encourage one of the most serious errors into which the inquirer into the philosophy of law can fall. It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together—it is because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity ; and because we in England are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly accustoming ourselves to the same modes of legal thought and to the same

conceptions of legal principle to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation.

The attempt, however, to explain at length why the flux and change which our law is visibly undergoing furnish the strongest reasons for studying a body of rules so mature and so highly refined as that contained in the *Corpus Juris*, would be nearly the same thing as endeavouring to settle the relation of the Roman law to the science of jurisprudence ; and that inquiry, from its great length and difficulty, it would be obviously absurd to prosecute within the limits of an Essay like the present. But there is a set of considerations of a different nature, and equally forcible in their way, which cannot be too strongly impressed on all who have the control of legal or general education. The point which they tend to establish is this :—the immensity of the ignorance to which we are condemned by ignorance of Roman law. It may be doubted whether even the best educated men in England can fully realise how vastly important an element is Roman law in the general mass of human knowledge, and how largely it enters into and pervades and modifies all products of human thought which are not exclusively English. Before we endeavour to give some distant idea of the extent to which this is true, we must remind the reader that the Roman

law is not a system of cases, like our own. It is a system of which the nature may, for practical purposes, though inadequately, be described by saying that it consists of principles, and of express written rules. In England, the labour of the lawyer is to extract from the precedents a formula, which, while covering *them*, will also cover the state of facts to be adjudicated upon ; and the task of rival advocates is, from the same precedents, or others, to elicit different formulas of equal apparent applicability. Now, in Roman law no such use is made of precedents. The *Corpus Juris*, as may be seen at a glance, contains a great number of what our English lawyers would term cases; but then they are in no respect sources of rules—they are instances of their application. They are, as it were, problems solved by authority in order to throw light on the rule, and to point out how it should be manipulated and applied. How it was that the Roman law came to assume this form so much sooner and more completely than our own, is a question full of interest, and it is one of the first to which the student should address himself; but though the prejudices of an Englishman will probably figure to him a jurisprudence thus constituted as, to say the least, anomalous, it is, nevertheless, quite as readily conceived, and quite as natural as the constitution of our own system. In proof of this, it may be remarked that

the English common law was clearly conceived by its earliest expositors as wearing something of this character. It was regarded as existing *somewhere* in the form of a symmetrical body of express rules, adjusted to definite principles. The knowledge of the system, however, in its full amplitude and proportions was supposed to be confined to the breasts of the judges, and the lay-public and the mass of the legal profession were only permitted to discern its canons intertwined with the facts of adjudged cases. Many traces of this ancient theory remain in the language of our judgments and forensic arguments, and among them we may perhaps place the singular use of the word 'principle' in the sense of a legal proposition elicited from the precedents by comparison and induction.

The proper business of a Roman jurisconsult was therefore confined to the interpretation and application of express written rules—processes which must, of course, be to some extent employed by the professors of every system of laws—of our own among others, when we attempt to deal with statute law. But the great space which they filled at Rome has no counterpart in English practice; and becoming, as they did, the principal exercise of a class of men characterised as a whole by extraordinary subtlety and patience, and in individual cases by extraordinary genius, they were the means of produc-

ing results which the English practitioner wants centuries of attaining. We, who speak without shame—occasionally with something like pride—of our ill success in construing statutes, have at our command nothing distantly resembling the appliances which the Roman jurisprudence supplies, partly by definite canons and partly by appropriate examples, for the understanding and management of written law. It would not be doing more than justice to the methods of interpretation invented by the Roman lawyers, if we were to compare the power which they give over their subject-matter to the advantage which the geometrician derives from mathematical analysis in discussing the relations of space. By each of these helps, difficulties almost insuperable become insignificant, and processes nearly interminable are shortened to a tolerable compass. The parallel might be carried still further, and we might insist on the special habit of mind which either class of mental exercise induces. Most certainly nothing can be more peculiar, special, and distinct than the bias of thought, the modes of reasoning, and the habits of illustration, which are given by a training in the Roman law. No tension of mind or length of study which even distantly resembles the labour of mastering English jurisprudence is necessary to enable the student to realise these peculiarities of mental view; but still they cannot be acquired without some effort, and

the question is, whether the effort which they demand brings with it sufficient reward. We can only answer by endeavouring to point out that they pervade whole departments of thought and inquiry of which some knowledge is essential to every lawyer, and to every man of decent cultivation.

In the first place, it is to be remarked, that all discussion concerning Moral Philosophy has for nearly two centuries been conducted on the Continent of Europe in the language and according to the modes of reasoning peculiar to the Roman Civil Law. Shortly after the Reformation, we find two great schools of thought dividing this class of subjects between them. The most influential of the two was at first the sect or school known to us as the Casuists, all of them in spiritual communion with the Roman Catholic Church, and nearly all of them affiliated to one or other of her religious orders. On the other side were a body of writers connected with each other by a common intellectual descent from the great author of the treatise *De Jure Belli et Pacis*, Hugo Grotius. Almost all of the latter were adherents of the Reformation, and, though it cannot be said that they were formally and avowedly at conflict with the Casuists, the origin and object of their system were, nevertheless, essentially different from those of Casuistry. It is necessary to call attention to this difference, because it involves the question of

the influence of Roman law on that department of thought with which both systems are concerned. The book of Grotius, though it touches questions of pure Ethics in every page, and though it is the parent, immediate or remote, of innumerable volumes of formal morality, is not, as is well known, a professed treatise on Moral Philosophy; it is an attempt to determine the Law of Nature, or Natural Law. Now, without entering upon the question, whether the conception of a Law Natural be not exclusively a creation of the Roman jurisconsults, we may lay down that, even on the admissions of Grotius himself, the dicta of the Roman jurisprudence as to what parts of known positive law must be taken to be parts of the Law of Nature, are, if not infallible, to be received, at all events, with the profoundest respect. Hence the system of Grotius is implicated with Roman law at its very foundation; and this connexion rendered inevitable—what the legal training of the writer would perhaps have entailed without it—the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the argument from the reader who is unfamiliar with the sources whence they have been derived. On the other hand, Casuistry borrows little from Roman law. A few technical expressions, of Roman origin, have penetrated into

its language through the medium of the Canon law ; but the form of the argument in the Casuistical writers is mostly taken from the course of a theological disputation in one of the academical schools, and the views of morality contended for have nothing whatever in common with the undertaking of Grotius. All that philosophy of right and wrong which has become famous, or infamous, under the name of Casuistry, had its origin[1] in the distinction between Mortal and Venial Sin. A natural anxiety to escape the awful consequences of determining a particular act to be mortally sinful, and a desire, equally intelligible, to assist the Roman Catholic Church in its conflict with Protestantism by disburthening it of an inconvenient theory, were the motives which impelled the authors of the Casuistical philosophy to the invention of an elaborate system of criteria, intended to remove immoral actions, in as many cases as possible, out of the category of mortal offences, and to stamp them as venial sins. The fate of this experiment is matter of ordinary history. We know that the distinctions of Casuistry, by enabling the priesthood to adjust spiritual control to all the varieties of human character, did really confer on it an influence with princes, statesmen, and

[1] This subject is fully and clearly discussed by Mr. Jowett. *Epistles of St. Paul*, Vol. ii., pp. 351, 352.

generals unheard of in the ages before the Reformation, and did really contribute largely to that great reaction which checked and narrowed the first successes of Protestantism. But beginning in the attempt, not to establish, but to evade—not to discover a principle, but to escape a postulate—not to settle the nature of right and wrong, but to determine what was not wrong of a particular nature,—Casuistry went on with its dexterous refinements till it ended in so attenuating the moral features of actions, and so belying the moral instincts of our being, that at length the conscience of mankind rose suddenly in revolt against it, and consigned to one common ruin the system and its doctors. The blow, long impending, was finally struck in the *Provincial Letters* of Pascal; and since the appearance of those memorable Papers, no moralist of the smallest influence or credit has ever avowedly conducted his speculations in the footsteps of the Casuists. The whole field of ethical science was thus left at the exclusive command of the writers who followed Grotius; and it still exhibits in an extraordinary degree the traces of that entanglement with Roman law which is sometimes imputed as a fault, and sometimes as the highest of its recommendations, to the Grotian theory. Many inquirers since Grotius's day have modified his principles, and many, of course, since the rise of the Critical Philosophy, have quite deserted them; but even those who

have departed most widely from his fundamental assumptions have inherited much of his method of statement, of his train of thought, and of his mode of illustration ; and these have little meaning and no point to the person ignorant of Roman jurisprudence. And, moreover, as speculations on ethics are implicated with, and exercise perceptible effect on, almost every department of inquiry which is not part of physics or physiology, the element of Roman law in the ethical systems of the Continent makes itself felt in quarters where, at first sight, one is quite unable to understand its presence. There is reason to believe that we in England attach much too slight an importance to that remarkable tinge of Roman law which is all but universal in the moral and political philosophy of Continental Europe. It has often been remarked with regret or surprise that, while the learned in the exacter sciences abroad and in England have the most perfect sympathy with each other—while the physician or the mathematician in London is completely at home in the writings of the physician or the mathematician in Berlin and Paris—there is a sensible, though invisible and impalpable, barrier which separates the jurists, the moral philosophers, the politicians, and, to some extent, the historians and even the metaphysicians of the Continent from those who professedly follow the same pursuits in England. A vague reference to our insular position

gives no clue to this anomaly. The exceptional character of our political institutions but partially explains it. Some difference in the intellectual training of Englishmen from that of foreigners must lie at the bottom of it, and the general mass of our acquirements is unlike that accumulated by educated men in other countries simply in the total omission of the ingredient of Roman law.

If these views are correct, the argument for the cultivation of Roman law as a branch of English legal education will have been carried some way, for it is probably unnecessary to show at length the intimate relation of moral philosophy to jurisprudence. Perhaps the state of English thought on ethical subjects may seem to take away something from the force of the reasoning. Unquestionably, the writings of Locke, and the immense development of Locke's doctrines by Bentham, have given us an ethical system which exercises very deep influence on the intellectual condition of England, and which at the same time borrows little or nothing from Roman law. The objection, however, may be answered in several ways. While it is doubtful whether it is desirable or possible that moral philosophy should be taught in England on any one set of principles, it is certainly neither desirable nor possible that it should be taught apart from its history. Moreover, the disconnexion between the Roman law and the philosophy of Bentham

exists rather in form than in substance. The latest and most sagacious expositors of Bentham have formally declared[1] their preference for the phraseology and the methods of Roman jurisprudence; and, indeed, there would be no great presumption in asserting that much of the laborious analysis which Bentham applied to legal conceptions was directed to the establishment of propositions which are among the fundamental assumptions of the jurisconsults. Truths which the language of English law, at once ultra-popular and ultra-technical, either obscures or conceals, shine clearly through the terminology of the Roman lawyers; and it is difficult to believe that they would ever have been lost sight of, if English common sense had been protected against delusion by knowledge of a system of which common sense is the governing characteristic. It is remarkable, too, that the law of England, wherever it touches moral philosophy openly and avowedly, touches it at the point at which it is most deeply implicated with Roman law. It is difficult to read the early Equity Reports without being struck by the influence which a particular school of jurists—the series of writers on the Law of Nature—had on the minds of the judges who first gave form and system to the jurisprudence of the Court of Chancery. Now, in the volumes of this

[1] Austin, *Province of Jurisprudence Determined*, App. pp. 45 *et seq.*

school, not only does moral philosophy retain the phraseology and the modes of reasoning peculiar to Roman law, but the two departments of thought have not as yet been recognised as separable, and as capable of being considered apart from each other. Even now, whenever a proposition of moral philosophy makes its appearance in an argument or in a judicial decision, it generally appears in the dress which was given to it by the first successors of Grotius. This peculiarity may, perhaps, be partially accounted for by the credit into which Story's *Conflict of Laws*—in the main a compendium of extracts from the writers just mentioned—has risen among us as an authority on Private International Law.

We are here brought to the verge of some considerations of a rather different character. In every language there are necessarily a number of words and phrases which are indicative of legal conceptions, and which carry with them a perpetual reference to the nature and the sanctions of law. Without such expressions, a vast variety of propositions in philosophy, in political economy, in theology, and even in strict science, could never be put into words. Now, it is remarkable that the English language derives a very small number of these expressions from English law; and, indeed, few things are more curious, or more illustrative of the peculiar relation in which the law of England has always stood to the other departments

of English thought, than the slightness of the influence which our jurisprudence has exercised on our tongue. The Law of Procedure and some other subordinate departments have contributed, though not largely, to enrich our vernacular dialect; and both in England and in America a considerable number of legal phrases have acquired currency as slang; but the expressions in classical English which are indicative of fundamental legal conceptions, come to us, almost without an exception, from Roman law. They have filtered into the language from a variety of sources, and never having been kept to their original meaning by any controlling system or theory, they have become mere popular expressions, exhibiting all the deficiencies of popular speech—vague, figurative, and inconsistent. Looked at even from an unprofessional point of view, this is a great evil. Unlike other nations, we lose all the advantage of having the most important terms of our philosophical phraseology scrutinized, sifted, and canvassed by the keen intellect of lawyers; and we deprive ourselves of that remarkable, and almost mysterious, precision which is given to words, when they are habitually used in discussions which are to issue directly in acts. It is difficult to say how much of the inferiority of England in philosophical speculation is owing to this laxity of language; and even if the mischiefs which it is calculated to produce were in themselves trifling,

they would become formidable in a country which is governed by free discussion. We can easily trace their effects on minds of rigid accuracy. Bentham was driven by them to invent a new vocabulary of his own, which is still the greatest obstacle to his influence. Mr. Austin can only evade them by a style out of which metaphor has been weeded till it has become positively repulsive. Dr. Whewell has acknowledged them by repeatedly falling back on the strict usage of the Roman jurisconsults. The evil, however, is not one which is felt solely by writers on the philosophy of jurisprudence. It extends to professional lawyers. Like all men who speak and think, they employ the expressions which have been described as inherited by us from Roman law; but they employ them solely as *popular* expressions—as expressions which serve merely to eke out technical phraseology. Even 'Obligation,' the term of highest dignity and importance in all jurisprudence, is not defined in English law, and is used by our lawyers with reckless inconsistency. The consequence is not quite the same as on the unprofessional world. It would be absurd to tax the English Bench and Bar with inaccurate thinking. But the natural resource of an accurate mind, dealing with mere popular language, is prolixity. Words and phrases must be constantly qualified and limited, and every important proposition, to prevent misapprehension, must be put in a great variety

of forms. Hence the extraordinary length of our forensic arguments and legal decisions. Hence that frightful accumulation of case-law which conveys to English jurisprudence a menace of revolution far more serious than any popular murmurs, and which, if it does nothing else, is giving to mere tenacity of memory a disgraceful advantage over all the finer qualities of the legal intellect.

There never, probably, was a technical phraseology which, unaided by popular language, was in itself sufficient for all the uses of lawyers. Where, however, the technical vocabulary is fairly equal to the problems which have to be discussed, the inconveniences just alluded to are reduced to a minimum. Is this the case with English law? It is impossible to answer the question without calling attention to the singular condition of our whole legal language. The technical part of it—whatever may be thought of the system to which it was an appendage—was certainly once quite able to cope with all the points which arose; nor did it drop or relax any of its remarkable precision in solving them. But its serviceableness has long since ceased. The technicalities of English law have lost all their rigidity and accuracy without at the same time becoming equal to the discussion of the questions which press daily on the attention of the Bench and the Bar. We misuse our terms of art without scruple—freely applying, for

example, to Personalty expressions which, having their origin in real property law, are ultimately referrible to feudal conceptions—and yet we have to call in popular phraseology to an extent unknown in any other system. Nothing harsher can be said of a legal vocabulary, than that it consists of technical phraseology in a state of disintegration, and of popular language employed without even an affectation of precision. Yet this reproach is the literal truth as respects the law of England. Many causes may be assigned for it. The eccentric course of our law reforms has, doubtless, contributed to it ; and it should not be forgotten that lawyers are apt to strain technical terms to new uses, under a sense of their superiority to language borrowed from ordinary discourse. But the grand cause of all has been the slightness of the care which, owing to the absence of an organized educational system, has been bestowed in England upon Legal and Legislative Expression. The heterogeneousness of the sources from which our tongue has been derived appears to impose on us, more than on any other nation, the duty of nurturing this branch of legal science ; and yet there is no nation in the world which has neglected it so signally. The evil consequences of our indifference have at length become patent and flagrant. They make themselves felt on all sides. They are seen in the lengthiness of our Law Reports. They show them-

selves in the miscarriages of our Acts of Parliament. They put us to the blush in the clumsiness of our attempts to grapple with the higher problems of law. It would be impertinent to pretend that any one complete remedy can be pointed out, but it may be affirmed without hesitation that several palliatives are within our reach. Though the decay of the technical element in our legal dialect is probably beyond help, a far greater amount of definiteness, distinctness, and consistency might assuredly be given to the popular ingredient. Legal terminology might be made a distinct department of legal education; and there is no question that, with the help of the Roman law, its improvement might be carried on almost indefinitely. The uses of the Roman jurisprudence to the student of Legislative and Legal Expression are easily indicated. First, it serves him as a great model, not only because a rigorous consistency of usage pervades its whole texture, but because it shows, by the history of the Institutional Treatises, in what way an undergrowth of new technical language may be constantly reared to furnish the means of expression to new legal conceptions, and to supply the place of older technicalities as they fall into desuetude. Next, it is the actual source of what has been here called the popular part of our legal dialect; a host of words and phrases, of which 'Obligation,' 'Convention,' 'Contract,' 'Consent,'

'Possession,' and 'Prescription,' are only a few samples, are employed in it with as much precision as are, or were, 'Estate Tail' and 'Remainder' in English law. Lastly, the Roman jurisprudence throws into a definite and concise form of words a variety of legal conceptions which are necessarily realized by English lawyers, but which at present are expressed differently by different authorities, and always in vague and general language. Nor is it over-presumptuous to assert that laymen would benefit as much as lawyers by the study of this great system. The whole philosophical vocabulary of the country might be improved by it, and most certainly that region of thought which connects Law with other branches of speculative inquiry, would obtain new facilities for progress. Perhaps the greatest of all the advantages which would flow from the cultivation of the Roman jurisprudence would be the acquisition of a phraseology not too rigid for employment upon points of the philosophy of law, nor too lax and elastic for their lucid and accurate discussion.

In the identity of much of our popular legal phraseology with the technical dialect of Roman law we have one chief source of the intellectual mist which interposes itself between an Englishman and a large part of Continental philosophy. We have also the chief reason why it is so difficult to convince an Englishman that any such impediment exists. Deal-

ing, for the most part, with language to which he is accustomed, he can scarcely be persuaded that he gains at most that sort of half knowledge which, as every lawyer knows, an intelligent layman will acquire from the perusal of a legal treatise on a branch of law in which the technical usage of words does not widely differ from the vernacular. There is, however, one subject of thought common to ourselves and the Continent, on which scarcely one man among us has probably consulted foreign writers of repute without feeling that he is in most imperfect contact with his authorities. It is the secret belief of many of the most accurate minds in England that International Law, Public and Private, is a science of declamation ; and, when phraseology intended by the writer to be taken strictly is understood by the reader loosely, the impression is not at all unnatural. We cannot possibly overstate the value of Roman Jurisprudence as a key to International Law, and particularly to its most important department. Knowledge of the system and knowledge of the history of the system are equally essential to the comprehension of the Public Law of Nations. It is true that inadequate views of the relation in which Roman law stands to the International scheme are not confined to Englishmen. Many contemporary publicists, writing in languages other than ours, have neglected to place themselves at the point of view from which the

originators of Public Law regarded it; and to his omission we must attribute much of the arbitrary assertion and of the fallacious reasoning with which the modern literature of the Law of Nations is unfortunately rife. If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurisconsults on the mind of Hugo Grotius, and, next, the influence of the great book of Grotius on International Jurisprudence,—we lose at once all chance of comprehending that body of rules which alone protects the European commonwealth from permanent anarchy, we blind ourselves to the principles by conforming to which it coheres, we can understand neither its strength nor its weakness, nor can we separate those arrangements which can safely be modified from those which cannot be touched without shaking the whole fabric to pieces. The authors of recent international treatises have brought into such slight prominence the true principles of their subject, or for those principles have substituted assumptions so untenable, as to render it matter of no surprise that a particular school of politicians should stigmatize International Law as a haphazard collection of arbitrary rules, resting on a fanciful basis and fortified by a wordy rhetoric. Englishmen, however,—and the critics alluded to are mostly Englishmen,—will always be more signally at fault than the rest of the world in

attempting to gain a clear view of the Law of Nations. They are met at every point by a vein of thought and illustration which their education renders strange to them; many of the technicalities delude them by consonance with familiar expressions, while to the meaning of others they have two most insufficient guides in the Latin etymology and the usage of the equivalent term in the non-legal literature of Rome. Little more than a year has elapsed since the Lower House of the English Parliament occupied several hours with a discussion as to the import of one of the commonest terms [1] inherited by modern jurisprudence from Roman law. Nor are these remarks answered by urging that comparative ignorance of International Law is of little consequence so long as the parties to International discussions completely understand each other; or, as it might be put, that Roman law may be important to the closet-study of the Law of Nations, but is unessential as regards diplomacy. There cannot be a doubt that our success in negotiation is sometimes perceptibly affected by our neglect of Roman law; for, from this cause, we and the public, or negotiators, of other countries constantly misunderstand each other. It is not rarely that we refuse respect or at tention to diplomatic communications, as wide of the point and full of verbiage or conceits, when, in fact,

[1] *Solidairement.* Hansard's *Parliamentary Debates*, July 27th, 1855.

they owe those imaginary imperfections simply to the juristical point of view from which they have been conceived and written. And, on the other hand, state-papers of English origin, which to an Englishman's mind ought, from their strong sense and directness, to carry all before them, will often make but an inconsiderable impression on the recipient from their not falling in with the course of thought which he insensibly pursues when dealing with a question of public law. In truth, the technicalities of Roman law are as really, though not so visibly, mixed up with questions of diplomacy as are the technicalities of special pleading with points of the English Common law. So long as they cannot be disentangled, English influence suffers obvious disadvantage through the imperfect communion of thought. It is undesirable that there should not be among the English public a sensible fraction which can completely decipher the documents of International transactions, but it is more than undesirable that the incapacity should extend to our statesmen and diplomatists. Whether Roman law be useful or not to English lawyers, it is a downright absurdity that, on the theatre of International affairs, England should appear by delegates unequipped with the species of knowledge which furnishes the medium of intellectual communication to the other performers on the scene.

The practitioner of English law who would care

little for the recommendations of this study which have as yet been mentioned, must nevertheless feel that he has an interest in Roman jurisprudence in respect of the relation in which it stands to all, or nearly all, foreign law. It may be confidently asserted, that if the English lawyer only attached himself to the study of Roman law long enough to master the technical phraseology and to realize the leading legal conceptions of the *Corpus Juris*, he would approach those questions of foreign law to which our Courts have repeatedly to address themselves with an advantage which no mere professional acumen acquired by the exclusive practice of our own jurisprudence could ever confer on him. The steady multiplication of legal systems, borrowing the entire phraseology, adopting the principles, and appropriating the greater part of the rules of Roman jurisprudence, is one of the most singular phenomena of our day, and far more worthy of attention than the most showy manifestations of social progress. This gradual approach of Continental Europe to a uniformity of municipal law dates unquestionably from the first French Revolution. Although Europe, as is well known, formerly comprised a number of countries and provinces which governed themselves by the written Roman law, interpolated with feudal observances, there does not seem to be any evidence that the institutions of these localities enjoyed any vogue or favour beyond

their boundaries. Indeed, in the earlier part of the last century there may be traced among the educated men of the Continent something of a feeling in favour of English law—a feeling proceeding, it is to be feared, rather from the general enthusiasm for English political institutions which was then prevalent, than founded on any very accurate acquaintance with the rules of our jurisprudence. Certainly, as respects France in particular, there were no visible symptoms of any general preference for the institutions of the *pays de droit écrit* as opposed to the provinces in which customary law was observed. But then came the French Revolution, and brought with it the necessity of preparing a general code for France one and indivisible. Little is known of the special training through which the true authors of this work had passed ; but in the form which it ultimately assumed, when published as the Code Napoleon, it may be described, without great inaccuracy, as a compendium of the rules of Roman law [1]

[1] It is not intended to imply that the framers of the Code Civil simply adopted the Civil law of the *pays de droit écrit*, and rejected that of the *pays de droit coutumier*. Many texts of the French Codes which seem to be literally transcribed from the *Corpus Juris* come from the *droit coutumier*, into which a large element of Roman law had gradually worked its way. Those parts of the Code Civil in which the Customs have been followed in points in which they differed from the Roman law are chiefly the chapters which have reference to Personal Relations; but in this department there had been, as might be expected, considerable deviations from Roman jurisprudence even in the *pays de droit écrit*.

then practised in France, cleared of all feudal admixture—such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists, and particularly by Pothier. The French conquests planted this body of laws over the whole extent of the French Empire, and the kingdoms immediately dependent on it; and it is incontestable that it took root with extraordinary quickness and tenacity. The highest tribute to the French Codes is their great and lasting popularity with the people, the lay-public, of the countries into which they have been introduced. How much weight ought to be attached to this symptom our own experience should teach us, which surely shows us how thoroughly indifferent in general is the mass of the public to the particular rules of civil life by which it may be governed, and how extremely superficial are even the most energetic movements in favour of the amendment of the law. At the fall of the Bonapartist Empire in 1815, most of the restored Governments had the strongest desire to expel the intrusive jurisprudence which had substituted itself for the ancient customs of the land. It was found, however, that the people prized it as the most precious of possessions: the attempt to subvert it was persevered in in very few instances, and in most of them the French Codes were restored after a brief

abeyance. And not only has the observance of these laws been confirmed in almost all the countries which ever enjoyed them, but they have made their way into numerous other communities, and occasionally in the teeth of the most formidable political obstacles. So steady, indeed, and so resistless has been the diffusion of this Romanized jurisprudence, either in its original or in a slightly modified form, that the civil law of the whole Continent is clearly destined to be absorbed and lost in it. It is, too, we should add, a very vulgar error to suppose that the civil part of the Codes has only been found suited to a society so peculiarly constituted as that of France. With alterations and additions, mostly directed to the enlargement of the testamentary power on one side, and to the conservation of entails and primogeniture on the other, they have been admitted into countries whose social condition is as unlike that of France as is possible to conceive. A written jurisprudence, identical through five-sixths of its tenor, regulates at the present moment a community monarchical, and in some parts deeply feudalized, like Austria,[1] and a community dependent for its existence on commerce, like Holland—a society so near

[1] The Code of Austria was commenced under Joseph II., but not completed till 1810. The portions of it which were framed after the appearance of the French Codes follow them in everything except some minor peculiarities of expression.

the pinnacle of civilization as France, and one as primitive and as little cultivated as that of Sicily and Southern Italy.

Undeniable and most remarkable as is this fact of the diffusion within half a century over nearly all Europe of a jurisprudence founded on the Civil Law of Rome, there are some minds, no doubt, to which it will lose much of its significance when they bethink themselves that in the ground thus gradually occupied, the French Codes have not had to compete directly with the Law of England. We can readily anticipate the observation, that against these conquests of a Romanized jurisprudence in Europe may be set off the appropriation of quite as large a field by the principles of our own system in America. There, it may be said, the English uncodified jurisprudence, with its conflict of Law and Equity, and every other characteristic anomaly, is steadily gathering within its influence populations already counted by millions, and already distinguished by as high a social activity as the most progressive communities of Continental Europe. It is not the object of this Essay to disparage the English law, and still less its suitableness to Anglo-Saxon societies ; but it is only honest to say that the comparison just suggested does not quite give at present the results expected from it. During many years after the severance of the United States from the mother-

country, the new States successively formed out of the unoccupied territory of the Federation did all of them assume as the standard of decision for the Courts in cases not provided for by legislation, either the Common law of England, or the Common law as transformed by early New England statutes into something closely resembling the Custom of London. But this adherence to a single model ceased about 1825. The State of Louisiana, for a considerable period after it had passed under the dominion of the United States, observed a set of civil rules strangely compounded of English case-law, French code-law, and Spanish usages. The consolidation of this mass of incongruous jurisprudence was determined upon, and after more than one unsuccessful experiment, it was confided to the first legal genius of modern times—Mr. Livingston. Almost unassisted,[1] he produced the Code of Louisiana, of all republications of Roman law the one which appears to us the clearest, the fullest, the most philosophical, and the best adapted to the exigencies of modern society. Now it is this code, and not the Common law of England, which the newest American States are taking for the substratum of their laws. The diffusion of the Code of Louisiana does, in fact,

[1] Mr. Livingston, as is well known, was the sole author of the Criminal Code. In the composition of the Civil Code, he was associated with MM. Derbigny and Morolislet; but the most important chapters, including all those on Contract, are entirely from his pen.

exactly keep step with the extension of the territory of the Federation. And, moreover, it is producing sensible effects on the older American States. But for its success and popularity, we should not probably have had the advantage of watching the greatest experiment which has ever been tried on English jurisprudence—the still-proceeding codification and consolidation of the entire law of New York.

The Roman law is, therefore, fast becoming the *lingua franca* of universal jurisprudence ; and even now its study, imperfectly as the present state of English feeling will permit it to be prosecuted, may nevertheless be fairly expected to familiarize the English lawyer with the technicalities which pervade, and the jural conceptions which underlie, the legal systems of nearly all Europe and of a great part of America. If these propositions are true, it seems scarcely necessary to carry further the advocacy of the improvements in legal education which are here contended for. The idle labour which the most dexterous practitioner is compelled to bestow on the simplest questions of foreign law is the measure of the usefulness of the knowledge which would be conferred by an Institutional course of Roman jurisprudence.

In the minds of many Englishmen, there is a decided, though vague, association between the study

of Roman law and the vehemently controverted topic of Codification. The fact that the two subjects are thus associated, renders it desirable that we should endeavour to show what, in our view, is their real bearing upon each other; but, before the attempt is made, it is worth while remarking that this term 'Codification,' modern as it is, has already undergone that degradation of meaning which seems in ambush for all English words that lie on the border-land between legal and popular phraseology, and has contracted an important ambiguity. Both those who affirm and those who deny the expediency of codifying the English law, visibly speak of Codification in two different senses. In the first place, they employ the word as synonymous with the conversion of Unwritten into Written Law. The difference between this meaning and another which will be noticed presently, may best be illustrated by pointing to the two Codes of Rome—the one which began and the one which terminated her jurisprudence—the Twelve Tables and the *Corpus Juris* of Justinian. At the dawn of legal history, the knowledge of the Customs or Observances of each community was universally lodged with a privileged order; with an Aristocracy, a Caste, or a Sacerdotal Corporation. So long as the law was confined to their breasts, it was true Unwritten Law; and it became written Law when the juristical oligarchy was compelled to part

with its exclusive information, and when the rules of civil life, put into written characters and exposed to public view, became accessible to the entire society. The Twelve Tables, the Laws of Draco, and to some extent of Solon, and the earliest Hindoo Code, were therefore products of Codification in this first sense of the word. There is no doubt, too, that the English Judges and the Parliaments of the *Pays Coutumiers* in France long claimed, and were long considered, to be depositaries of a body of law which was not entirely revealed to the lay-public. But this theory, whether it had or had not a foundation in fact, gradually crumbled away, and at length we find it clearly, though not always willingly, acknowledged that the Legislature has the exclusive privilege of declaring to be law that which is not written as law in previous positive enactments, or in books and records of authority. Thenceforward, the old ideas on the subject of the judicial office were replaced by the assumption, on which the whole administration of justice in England is still founded, that *all* the law is declared, but that the Judges have alone the power of indicating with absolute certainty in what part of it particular rules are to be found. For at least two centuries before the Revolution, the French *Droit Coutumier*, though still conventionally opposed to the *Droit Écrit*, or Roman Law, had itself become *written* law; nobody pretended to look for it elsewhere than

in Royal Ordinances, or in the *Livres de Coutumes*, or in the tomes of the Feudists. So, again, it is not denied by anybody in England, and certainly not by the English Judges, that every possible proposition of English jurisprudence may be found, in some form or other, in some chapter of the *Statutes at Large*, or in some page of one of the eight hundred volumes of our Law Reports. English Law is therefore Written Law ; and it is also Codified Law, if the conversion of unwritten into written law is Codification. Codification is, however, plainly used in another sense, flowing from the association of the word with the great experiment of Justinian. When Justinian ascended the throne, the Roman law had been written for centuries, and the undertaking of the Emperor and his advisers was to give orderly arrangement to this written law—to deliver it from obscurity, uncertainty, and inconsistency—to clear it of irrelevancies and unnecessary repetitions—to reduce its bulk, to popularize its study, and to facilitate its application. The attempt, successful or not, gives a second meaning to Codification. The word signifies the conversion of Written into *well* Written law ; and in this sense English jurisprudence is certainly not Codified, for, whatever be its intrinsic merits, it is loosely and lengthily written, and its *Corpus Juris* is a Law Library. Yet surely Codification, taken in this second acceptation, indicates one of the highest and

worthiest objects of human endeavour. It is always difficult to know what requires to be proved in England ; but it appears tolerably obvious, that if law be written at all it is desirable that it should be clearly, tersely, and accurately written. The true question is, not whether Codification be itself a good thing, but whether there is power enough in the country to overcome the difficulties which impede its accomplishment. Can any body of men be collected which shall join accurate knowledge of the existing law to a complete command of legislative expression and an intimate familiarity with the principles of legal classification ? If not, the argument for a Codification of English law is greatly weakened. Few will deny that badly-expressed law, thoroughly understood and dexterously manipulated, is better than badly-expressed law of which the knowledge is still to seek. And, indeed, when it does not seem yet conceded that we can produce a good statute, it appears premature to ask for a Code.

It cannot be pretended that knowledge of the Roman law would by itself enable Englishmen to cope with the difficulties of Codification. Yet it is certain that the study of Roman law, as ancillary to the systematic cultivation of legal and legislative expression, would arm the lawyer with new capacities for the task; and we may almost assert, having regard to the small success of Bentham's experiments

on English legal phraseology, that Codification will never become practicable in England without some help from that wonderful terminology which is, as it were, the Short-hand of jurisprudence. Still larger would be the sphere of Roman law if all obstacles were overcome, and a Code of English law were actually prepared. It is not uncommonly urged by the antagonists of Codification, that Codified law has some inherent tendency to produce glosses, or, as they sometimes put it, that Codes always become *overlaid* with commentaries and interpretative cases. If the learned persons who entertain this opinion, instead of arguing from the half-understood statistics of foreign systems, would look to their own experience, they would see that their position is either trivial or paradoxical. If by Codified law they merely mean *written* law, they need not go far from home to establish their point; for the English law, which is as much written law as the Code of Louisiana, throws off in each year about fifteen hundred authoritative judgments, and about fifty volumes of unauthoritative commentary. On the other hand, if Codified law is used by these critics to signify law as clearly and harmoniously expressed as human skill can make it, their assertion draws with it the monstrous consequence that a well-drawn Statute produces more glosses than one which is ill drawn, so that the Act for the Abolition of Fines and Recoveries ought to have produced more

cases than the Thellusson Act. The truth which lies at the bottom of these cavils is probably this—that no attainable skill applied to a Code can wholly prevent the extension of law by judicial interpretation. Bentham thought otherwise, and it is well known that in several Codes the appeal to mere adjudicated cases is expressly interdicted. But the process by which the application of legal rules to actual occurrences enlarges and modifies the system to which they belong, is so subtle and so insensible, that it proceeds even against the will of the interpreters of the law; and, indeed, the assumption made directly or indirectly in every Code, that the principles which it supplies are equal to the solution of every possible question, appears to carry necessarily with it some power of creating what Bentham would have called judge-made law. There are means, however, by which this judicial legislation may be reduced to a minimum. A Code, like a Statute, narrows the office of the judicial expositor in proportion to the skill shown in penning it. Some use, though very sparing[1] use, is made of cases in the interpretation of French law; but the Code of Louisiana, which was framed by persons who had many advantages over the authors of the Code Napoleon, is said to have been very little modified by cases, though the practitioners of an American State have, as might be

[1] The exact extent to which cases are employed will be easily seen on opening the Commentary of M. Troplong.

expected, no prejudice against them. Yet the surest preservative of all against over-reliance on adjudged precedents, and the best mitigation of imperfections in a Code of English Law, would be something of the peculiar tact which is extraordinarily developed in the Roman jurisconsults. We have already spoken of the instruction given by the Civil law in the interpretation and manipulation of express written rules. It may even be affirmed that the study of Roman jurisprudence is itself an education in those particular exercises.

Apart, however, from these litigated questions, attention may be called to the tacit Codification (the word being always taken in its second sense) which is constantly proceeding in our law. Every time the result of a number of cases is expressed in a formula, and that formula becomes so stamped with authority—whether the authority of individual learning or of long-continued usage—that the Courts grow disinclined to allow its terms to be revised on a mere appeal to the precedents upon which it originally rested, then, under such circumstances, there is, *pro tanto*, a Codification. Many hundred, indeed many thousand, dicta of Judges—not a few propositions elicited by writers of approved treatises, such as the well-known books on *Vendors and Purchasers* and on *Powers*—are only distinguishable in name from the texts of a Code ; and, much as the current

language of the legal profession may conceal it, an acute observer may discover that the process of, as it were, stereotyping certain legal rules is at this moment proceeding with unusual rapidity, and is, indeed, one of the chief agencies which save us from being altogether overwhelmed by the enormous growth of our case-law. In the manipulation of texts thus arrived at, there is room for those instrumentalities which the Roman law has been described as supplying—although doubtless the chance, which is never quite wanting, of the rule being modified or changed on a review of the precedents, is likely to prevent the free use of canons of interpretation which assume the fixity of the proposition to be interpreted. No such risk of modification impends, however, over the Statute-law; and surely the state of this department of our jurisprudence, coupled with the facts of its vastness and its ever-increasing importance, make the reform of our legal education a matter of the most pressing and immediate urgency. It is now almost a commonplace among us, that English lawyers, though matchless in their familiar field of case-law, are quite unequal to grapple with express enactments; but the profession speaks of the imperfection with levity and without shame, because the fault is supposed to lie with the Legislature. Unquestionably our legislation does occasionally fall short of the highest standard in respect of lucidity, terseness, and orderly

arrangement; but even though the admission be true in all its tenor, it appears merely to shift the reproach a single step, for nobody doubts that our statutes are framed by lawyers, and are, in the long run, the fruit of whatever capacity for orderly disposition and whatever power of comprehensive expression are to be found among the Bar. The Statute-book is no credit to the Legislature; but it is, at the same time, the *opprobrium jurisperitorum.* Not, indeed, that its condition is attributable to individual framers of statutes, who frequently work marvels, considering the circumstances in which they are placed. It may, with much greater justice, be explained by the special mental habits of the English Bar in general; and it is, in fact, one of the many consequences of forgetting the great truth, that to secure the consistency and cohesion of a body of law, a uniform system of legal education is as necessary as a common understanding among the Judges, or a free interchange of precedents among the Courts.

Before, however, we try to establish the proposition just hazarded, it may be as well to notice the argument which attributes all the imperfections of the Statute-law to the procedure of Parliament. It is urged that insufficient care is bestowed on the selection of draftsmen, so that the results of the highest skill and labour are discredited by juxtaposition with the work of inferior hands. The grand source of

mischief is, however, affirmed to be the practice of introducing Amendments into Bills during their passage through the Houses ; so that the unity of language and conception which pervaded the original production is completely broken through, and the measure is interpolated with clauses penned in ignorance of the particular technical objects which the first draftsman had in view. For remedy of this palpable evil, many schemes have been proposed ; and a good authority has suggested the creation of a board of official draftsmen, which should revise the draft of every proposed measure before it is submitted to Parliament, and to which every Bill, with its amendments, should, at some stage of the subsequent proceedings, be referred, in order that the changes accepted by the House should be harmonized with the general texture of the enactment. The advantages of such an institution, for all technical purposes, are not to be questioned ; but the plan seems one little likely to be adopted, as being signally at conflict with the current sentiments of Englishmen. It interferes in appearance with the liberty of Parliament, and there is no doubt that, in reality, it is a much more formidable institution than its projectors imagine. In order that its objects should be completely realized, it would be probably necessary to arm this board with all the powers which, even under the French Constitution of 1848, were confided to the

Council of State ; and the admission must in honesty be made, that the Council of State has always practically fettered the activity of French legislatures, and has uniformly gained in dignity and power at the expense of constitutional freedom. Far be it from us to deny that by a carefully-elaborated mechanism all these risks might be avoided ; but an improvement likely at best to be opposed by such strong prepossessions, might well be postponed, if a simpler remedy can be discovered.

The truth is, that both the difficulty of drafting Statutes and the confusion caused by amending them are infinitely greater than they need be, and infinitely greater than they would be if English practitioners were subjected to any system of legal education in which proper attention was paid to the dialect of legislation and law. This branch of study may be described, though the comparison cannot from the nature of the case be taken strictly, as having for its object to bring all language, for legal purposes, to the condition of algebraic symbols, and therefore to produce uniformity of method in its employment, and identity of inference in its interpretation. In practice, of course, nothing more than an approximation to these results could be obtained; but it is likely that a general educational machinery, even though comparatively inefficient, would add materially to the extent and importance of that portion of legis

lative phraseology which is common stock. As matters stand, each draftsman of statutes is absolutely separated from his colleagues. Each works on his own basis, in some cases with consummate skill and knowledge, in occasional instances with very little either of the one or the other. Each forms his own legislative dialect, and even frames the dictionary by which the public and the Courts are to interpret it. The greatest possible varieties of style, visible even to a layman, do, in fact, show themselves in the later volumes of the Statute-book; and in the drafting of some of the most important Statutes passed quite recently, it is plain that two distinct models have been followed, one of them involving the use of extremely technical, the other of excessively popular language. The effect of Amendments on Bills which are drawn under such circumstances is quite disastrous; and if the confusion which they create is not immediately detected by a non-legal eye, it is only from inadequate appreciation of the value which at once attaches to the separate words and phrases of legislative enactments when subjected to judicial scrutiny. The interpolations are not merely like touches by an inferior artist in the painting of a master. They are not simply blemishes which offend taste, and which require a connoisseur to discover them. They are far more like a new language, a new character, and a new vein of thought, suddenly occurring in a document or

inscription, which has to be deciphered exclusively by the means of information which it furnishes itself to the interpreter.

The mischiefs arising from the Amendment of Bills are much aggravated by the peculiar canons of interpretation which the insulation of draftsmen forces upon our tribunals. The English law was always distinguished from other systems, and particularly from the Roman law, by the scantiness of its apparatus of rules for construing Statute-law as a whole. In proportion, however, to the growing variety of style and arrangement in Acts of Parliament, the availableness of the existing rules has progressively diminished, and timidity in applying them has insensibly increased, until at length Bench, Bar, and Commentators have pretty well acquiesced in the practice of looking exclusively to the particular Statute which may be under consideration for the means of interpreting it—of refusing, as it is sometimes phrased, to travel out of the four corners of the Act. Of all the anomalies which disfigure or adorn the Law of England, this is not the one which would least astonish the foreign jurist. English lawyers, however, have lost all sense of its unnaturalness, and it really seems inevitable, so long as the different chapters of the Statute-book are connected by no relation except of subject. Unfortunately, it reacts upon the draftsman, and adds very materially to his difficulties and

responsibilities. It forces him not only to set out all the bearings of the legal innovation which he means to introduce, but to disclose the very elements of the legislative dialect in which he intends to declare them. It imposes on him a verbose prolixity which seriously increases his liability to misconstruction, and involves him in a labyrinthine complexity of detail which renders his work peculiarly susceptible of injury by amendments and alterations. The vastness of their contents has been repeatedly pointed out as the characteristic vice of English Statutes. No doubt, this is partially caused by the marked tendency of our legislation to deal not so much with principles as with applications of principles, the authors of enactments endeavouring to anticipate all the possible results of a fundamental rule, with the view of limiting or enlarging them, but scarcely ever risking the attempt to modify and shape anew the fundamental rule itself. But the great cause is certainly that which has been indicated, in the want of a common fund of technical legislative expression, and in the methods of judicial construction which are entailed upon us by this *lacuna* in our law. Every English Act of Parliament is, in fact, forced to carry on its back an enormous mass of matter which, under a better system, would be produced as it is wanted from the permanent storehouse of jurisprudence; and it is to this necessity that the frequent miscarriages of our Statute-law

ought to be attributed, quite as much as to defects in the mechanism of legislation.

There are many persons who will be sufficiently attracted to the study of Roman Law by the promise which it holds out of helping to enrich our language with a new store of Legal and Legislative Expression; of contributing to clear up the obscurity which surrounds the fundamental conceptions of all jurisprudence; of throwing light, by the illustrative parallels which it affords, on many of the principles peculiar to English law; and lastly, of enabling us, by the observation of its own progress, to learn something of the course of development which every body of legal rules is destined to follow. To such minds many of the remarks offered in this Essay have been less addressed than to those who are likely to be affected by the common aspersion on these studies, that they are not of any practical value. It is to be hoped that future generations will not judge the present by its employment of the word 'practical.' This solitary term, as has been truly enough remarked, serves a large number of persons as a substitute for all patient and steady thought; and, at all events, instead of meaning that which is useful, as opposed to that which is useless, it constantly signifies that of which the use is grossly and immediately palpable, as distinguished from that of which the usefulness can only be discerned after attention and

exertion, and must at first be chiefly believed, on the faith of authority. Now, certainly, if by mastering the elements of Roman Law we gain the key to International Law, public and private, and to the Civil Law of nearly all Europe, and of a large part of America—if, further, we are put in a fair way to acquire a dexterity in interpreting express rules which no other exercise can confer—the uses of this study must be allowed not to lie very remote from the pursuits of even the most servile practitioner; but still the vulgar notions concerning practical usefulness make it necessary to give the warning that the aids furnished by Roman law are not, for the most part, instantly available. It is not difficult to perceive that the comparative credit into which Roman jurisprudence is rising is constantly tempting persons to appeal to its resources who are not properly prepared to employ them. Except where the English lawyer is gifted with extraordinary tact, it is exceedingly dangerous for him to open the *Corpus Juris*, and endeavour, by the aid of the knowledge of Latinity common in this country, to pick out a case on all-fours with his own, or a rule germane to the point before him. The Roman law is a system of rules rigorously adjusted to principles, and of cases illustrating those rules; and unless the practitioner can guide himself by the clue of principle, he will almost infallibly imagine parallels where they have no existence, and as

certainly miss them when they are there. No one, in short, should read his Digest without having mastered his Institutes. When, however, the fundamental conceptions of Roman law are thoroughly realized, the rest is mastered with surprising facility—with an ease, indeed, which makes the study, to one habituated to the enormous difficulty of English law, little more than child's play.

Whatever be the common impressions on the point, there are singular facilities in England for the cultivation of Roman law. We already prosecute with as much energy as any community in the world the studies which lead up to this one, and the studies to which this one ought to be introductory. Between classical literature and English law, the place is made for the Roman jurisprudence. It would effectually bridge over that strange intellectual gulf which separates the habits of thought which are laboriously created at our Schools and Universities from the habits of thought which are necessarily produced by preparation for the Bar—a chasm which, say what we will, costs the legal profession some of the finest faculties of the minds which do surmount it, and the whole strength of the perhaps not inferior intellects which never succeed in getting across. In England, too, we should have the immense advantage of studying the pure classical Roman law, apart from the load of adventitious

speculation with which it has got entangled during its contact with the successive stages of modern thought. Neither custom nor opinion would oblige us, as they oblige the jurists of many other countries, to embarrass ourselves with the solution of questions engrafted on the true Roman jurisprudence by the scholasticism of its first modern doctors, by the philosophical theories of its next expositors, and by the pedantry of its latest interpreters. Apart from these gratuitous additions, it is not a difficult study, and the way is cleared for it. Nothing would seem to remain except to demonstrate its value; and here, no doubt, is the difficulty. The unrivalled excellence of the Roman law is often dogmatically asserted, and, for that very reason perhaps, is often superciliously disbelieved; but, in point of fact, there are very few phenomena which are capable of so much elucidation, if not explanation. The proficiency of a given community in jurisprudence depends, in the long run, on the same conditions as its progress in any other line of inquiry; and the chief of these are the proportion of national intellect devoted to it, and the length of time during which it is so devoted. Now, a combination of all the causes, direct and indirect, which contribute to the advancing and perfecting of a science, continued to operate on the jurisprudence of Rome through the entire space between the Twelve Tables and the reform of Justinian,—and that not irregularly or at

intervals, but in steadily increasing force and constantly augmenting number. We should reflect that the earliest intellectual exercise to which a young nation devotes itself is the study of its laws. The first step in mental progress is to generalize, and the concerns of everyday life are the first to press for comprehension within general rules and inflexible formulas. The popularity of the pursuit on which all the energies of the young commonwealth are bent is, at the outset, unbounded; but it ceases in time. The monopoly of mind by law is broken down. The crowd at the morning audience of the great Roman jurisconsult lessens. The students are counted by hundreds instead of thousands in the English Inns of Court. Art, Literature, Science, and Politics claim their share of the national intellect; and the practice of jurisprudence is confined within the circle of a profession never, indeed, limited or insignificant, but attracted as much by the rewards as by the intrinsic recommendations of their science. This succession of changes exhibited itself even more strikingly at Rome than in England. To the close of the Republic, the law was the sole field for all ability except the special talent of a capacity for generalship. But a new stage of intellectual progress began with the Augustan age, as it did with our own Elizabethan era. We all know what were its achievements in poetry and prose; but there are some indications, it

should be remarked, that, besides its efflorescence in ornamental literature, it was on the eve of throwing out new aptitudes for conquest in physical science. Here, however, is the point at which the history of mind in the Roman State ceases to be parallel to the routes which mental progress has since then pursued. The brief span of Roman literature, strictly so called, was suddenly closed under a variety of influences, which, though they may partially be traced, it would be improper in this place to analyse. Ancient intellect was forcibly thrust back into its old courses, and law again became no less exclusively the proper sphere for talent than it had been in the days when the Romans despised philosophy and poetry as the toys of a childish race. Of what nature were the external inducements which, during the Imperial period, tended to draw a man of inherent capacity to the pursuits of the jurisconsult, may best be understood by considering the option which was practically before him in his choice of a profession. He might become a teacher of rhetoric, a commander of frontier-posts, or a professional writer of panegyrics. The only other walk of active life which was open to him was the practice of the law. Through *that* lay the approach to wealth, to fame, to office, to the council-chamber of the monarch—it may be to the very throne itself.

The stoppage of literary production at Rome is sometimes spoken of as if it argued a decay of Roman

intellect, and therfore a decline in the mental energies of the civilized world. But there seems to be no ground for such an assumption. Many reasons may be assigned for the phenomenon in question; but none of them can be said to imply any degeneration of those faculties which, but for intervening impediments, might have been absorbed by art, science, or literature. All modern knowledge and all modern invention are founded on some disjointed fragments of Greek philosophy, but the Romans of the Empire had the whole edifice of that philosophy at their disposal. The triumphs of modern intellect have been accomplished in spite of the barriers of separate nationalities; but the Roman Empire soon became homogeneous, and Rome, the centre towards which the flower of the provincial youth drew together, became the depository of all the available talent in the world. On these considerations, it would seem that progress of some kind or other, at least equal to our own, might have been expected *à priori* ; and indeed, whatever we may think of *results*, it seems both presumptuous and contrary to analogy, to affirm that *capacities* were smaller in the reign of the Antonines than in the reign of James the First. And if this be so, we know the labour on which these capacities exhausted themselves. The English law has always enjoyed even more than its fair share of the disposable ability of the country; but what would it have been if, besides Coke, Somers, Hardwicke, and Mansfield,

it had counted Locke, Newton, and the whole strength of Bacon—nay, even Milton and Dryden—among its chief luminaries? It would be idle, of course, to affect to find the exact counterparts of these great names among the masters of Roman jurisprudence; but those who have penetrated deepest into the spirit of the Ulpians, Papinians, and Pauluses are ready to assert that in the productions of the Roman lawyers they discover all the grand qualities which we identify with one or another in the list of distinguished Englishmen. They see the same force and elegance of expression, the same rectitude of moral view, the same immunity from prejudice, the same sound and masculine sense, the same sensibility to analogies, the same keen observation, the same nice analysis of generals, the same vast sweep of comprehension over particulars. If this be delusion, it can only be exposed by going step by step over the ground which these writers have traversed. All the antecedent probabilities are in favour of their assertion, however audacious it may appear. Unless we are prepared to believe that for five or six centuries the world's collective intellect was smitten with a paralysis which never visited it before or since, we are driven to admit that the Roman jurisprudence may be all which its least cautious encomiasts have ventured to pronounce it, and that the language of conventional panegyric may even fall short of the unvarnished truth.

APPENDICES.

APPENDIX I.[1]

MINUTE RECORDED ON OCTOBER 1, 1868.

THE first conclusion which I draw (from a Paper 'showing in each case the authority at whose suggestion the Acts of the Governor-General in Council, from No. I. of 1865, to No. XXXVIII. of 1867, were passed') is, that next to no legislation originates with the Supreme Government of India. The only exceptions to complete inaction in this respect which are worth mentioning, occur in the case of Taxing Acts—though, as there is often much communication with the Provincial Governments on the subject of these Acts, the exception is only partial—and in that of a few Acts adapting portions of English Statute-law to India. Former Indian Legislatures introduced into India certain modern English Statutes, limiting their operation to 'cases governed by English law.' The most recent English amendments of the Statutes were, however, not followed in this country until they were embodied in Indian Acts by my predecessor, Mr. Ritchie, and myself, in accordance with the general wish of the Bench and Bar of the High Courts. Examples of this sort of legislation are Acts XXVII. and XXVIII. of 1866, which only apply to 'cases governed by English law.'

The second and much the most important inference which the Paper appears to me to suggest is, that the great bulk of the legislation of the Supreme Council is

[1] Vide p. 70.

attributable to its being the Local Legislature of many Indian Provinces. At the present moment, the Council of the Governor-General for making Laws and Regulations is the sole Local Legislature for the North-Western Provinces, for the Punjab, for Oudh, for the Central Provinces, for British Burmah, for the petty Province of Coorg, and for many small patches of territory which are scattered among the Native States. Moreover, it necessarily divides the legislation of Bengal Proper, Madras, and Bombay with the local Councils of those Provinces. For, under the provisions of the High Court's Act of 1861, it is only the Supreme Legislature which can alter or abridge the jurisdiction of the High Courts, and as this jurisdiction is very wide and far-reaching, the effect is to throw on the Governor-General's Council no small amount of legislation which would naturally fall on the Local Legislatures. Occasionally, too, the convenience of having but one law for two Provinces, of which one has a Council and the other has none, induces the Supreme Government to legislate for both, generally at the request of both their Governments.

Now these Provinces for which the Supreme Council is the joint or sole Legislature exhibit very wide diversities. Some of these differences are owing to distinctions of race, others to differences of land-law, others to the unequal spread of education. Not only are the original diversities between the various populations of India believed nowadays to be much greater than they were once thought to be, but it may be questioned whether, for the present at all events, they are not rather increasing than diminishing under the influence of British Government. That influence has no doubt thrown all India more or less into a state of ferment and progress, but the rate of progress is very unequal and irregular. It is growing more and more difficult to bring the population of two or more Pro-

vinces under any one law which goes closely home to their daily life and habits.

Not only, then, are we the Local Legislature of a great many Provinces, in the sense of being the only authority which can legislate for them on all or certain subjects, but the condition of India is more and more forcing us to act as if we were a Local Legislature, of which the powers do not extend beyond the Province for which we are legislating. The real proof, therefore, of our over-legislation would consist, not in showing that we pass between thirty and forty Acts in every year, but in demonstrating that we apply too many new laws to each or to some one of the Provinces subject to us. Now, I will take the most important of the territories for which we are exclusively the Legislature—the North-Western Provinces; and I will take the year in which, judging from the Paper, there has been most North-Western legislation—the year 1867. The amount does not seem to have been very great or serious. I find that in 1867, if Taxing Acts be excluded, the North-West was affected in common with all or other parts of India by an Act repressive of Public Gambling (No. III.); by an Act for the Registration of Printing Presses (No. XXV.); and by five Acts (IV., VII., VIII., X., and XXXIII.) having the most insignificant technical objects. I find that it was exclusively affected by an Act (I.) empowering its Government to levy certain tolls on the Ganges; by an Act (XXII.) for the Regulation of Native Inns; by an Act (XVIII.) giving a legal constitution to the Courts already established in a single district, and by an Act (XXVIII.) confirming the sentences of certain petty Criminal Courts already existing. I find further that, in the same year, 1867, the English Parliament passed 85 Public General Acts applicable to England and Wales, of which one was the Representation of the People Act. The number of Local and Personal Acts passed in the same year was 188. All this legislation,

too, came, it must be remembered, on the back of a vast mass of Statute-law, compared with which all the written law of all India is the merest trifle. Now the population of England and Wales is rather over 20 millions, that of the North-Western Provinces is supposed to be above 30 millions. No trustworthy comparison can be instituted between the two countries; but, regard being had to their condition thirty years ago, it may be doubted whether, in respect of opinions, ideas, habits, and wants, there has not been more change during thirty years in the North-West than in England and Wales.

A third inference which the Paper suggests is, that our legislation scarcely ever interferes, even in the minutest degree, with Private Rights, whether derived from usage or from express law. It has been said by a high authority that the Indian Legislature should confine itself to the amendment of Adjective Law, leaving Substantive Law to the Indian Law Commissioners. It is meant no doubt that the Indian Legislature should only occupy itself, *proprio motu*, with improvements in police, in administration, in the mechanism and procedure of courts of justice. This proposition appears to me a very reasonable one in the main, but it is nearly an exact description of the character of our legislation. We do not meddle with Private Rights; we only create Official Duties. No doubt Act X. of 1865 and Act XV. of 1866 do considerably modify Private Rights, but the first is a chapter and the last a section of the Civil Code framed in England by the Law Commissioners.

The Paper does not of course express the urgency with which the measures which it names are pressed on us by their originators—the Local Governments. My colleagues are, I believe, aware that the earnestness with which these Governments demand legislation, as absolutely necessary for the discharge of their duties to the people, is sometimes very remarkable. I am very far indeed from be-

lieving that, as they are now constituted, they think the Supreme Council precipitate in legislation. I could at this moment name half a dozen instances in which the present Lieutenant-Governors of Bengal and the North-West deem the hesitation of the Government of India in recommending particular enactments to the Legislature unnecessary and unjustifiable.

While it does not seem to me open to doubt that the Government of India is entirely free from the charge of initiating legislation in too great abundance, it may nevertheless be said that we ought to oppose a firmer resistance to the demands of the Local Governments and other authorities for legislative measures. It seems desirable therefore that I should say something of the influences which prompt these Governments, and which constitute the causes of the increase in Indian legislation. I must premise that I do not propose to dwell on causes of great generality. Most people would admit that, for good or for evil, the country is changing rapidly, though not at uniform speed. Opinion, belief, usage, and taste are obviously undergoing more or less modification everywhere. The standard of good government before the minds of officials is constantly shifting, perhaps it is rising. These phenomena are doubtless among the ultimate causes of legislation; but, unless more special causes are assigned, the explanation will never be satisfactory to many minds.

I will first specify a cause which is in itself of a merely formal nature, but which still contributes greatly for the time to the necessity for legislation. This is the effect of the Indian Councils' Act of 1861 upon the system which existed before that date in the Non-Regulation Provinces. It is well known that, in any strict sense of the word, the Executive Government legislated for those Provinces up to 1861. The orders, instructions, circulars, and rules for the guidance of officers which it constantly issued were,

to a certain extent, essentially of a legislative character, but then they were scarcely ever in a legislative form. It is not matter of surprise that this should have been so, for the authority prescribing the rule immediately modified or explained it, if it gave rise to any inconvenience, or was found to be ambiguous. But the system (of which the legality had long been doubted) was destroyed by the Indian Councils' Act. No Legislative power now exists in India which is not derived from this Statute; but to prevent a wholesale cancellation of essentially legislative rules, the 25th Section gave the force of law to all rules made previously for Non-Regulation Provinces by or under the authority of the Government of India, or of a Lieutenant-Governor. By this provision, an enormous and most miscellaneous mass of rules, clothed to a great extent in general and popular language, was suddenly established as law, and invested with solidity and unchangeableness to a degree which its authors had never contemplated. The difficulty of ascertaining what is law and what is not in the former Non-Regulation Provinces is really incredible. I have, for instance, been seriously in doubt whether a particular clause of a Circular intended to prescribe a rule or to convey a sarcasm. The necessity for authoritatively declaring rules of this kind, for putting them into precise language, for amending them when their policy is doubted, or when they are tried by the severer judicial tests now applied to them, they give different results from those intended by their authors, is among the most imperative causes of legislation. Such legislation will, however, diminish as the process of simplifying and declaring these rules goes on, and must ultimately come to a close.

I now come to springs of legislation which appear to increase in activity rather than otherwise. First among these I do not hesitate to place the growing influence of courts of justice and of legal practitioners. Our Courts

are becoming more careful of precise rule both at the top and at the bottom. The more careful legal education of the young civilians and of the younger Native judges diffuses the habit of precision from below; the High Courts, in the exercise of their powers of supervision, are more and more insisting on exactness from above.

An even more powerful influence is the immense multiplication of legal practitioners in the country. I am not now speaking of European practitioners, though their number has greatly increased of late, and though they penetrate much further into the Mofussil than of old. The great addition, however, is to the numbers and influence of the Native Bar. Practically a young educated Native, pretending to anything above a clerkship, adopts one of two occupations—either he goes into the service of Government or he joins the Native Bar. I am told, and I believe it to be true, that the Bar is getting to be more and more preferred to Government service by the educated youth of the country, both on the score of its gainfulness and on the score of its independence.

Now the law of India is at present, and probably will long continue to be, in a state which furnishes opportunity for the suggestion of doubts almost without limit. The older written law of India (the Regulations and earlier Acts) is declared in language which, judged by modern requirements, must be called popular. The authoritative Native treatises on law are so vague that, from many of the dicta embodied by them, almost any conclusion can be drawn. More than that, there are, as the Indian Law Commissioners have pointed out, vast gaps and interspaces in the Substantive Law of India; there are subjects on which no rules exist; and the rules actually applied by the Courts are taken, a good deal at haphazard, from popular text-books of English law. Such a condition of things is a mine of legal difficulty. The Courts are getting ever more rigid in their demand of legal warrant for the actions of all

men, officials included. The lawyers who practise before them are getting more and more astute, and render the difficulty of pointing to such legal warrant day by day greater. And unquestionably the Natives of India, living in the constant presence of courts and lawyers, are growing every day less disposed to regard an Act or Order which they dislike as an unkindly dispensation of Providence, which must be submitted to with all the patience at their command. If British rule is doing nothing else, it is steadily communicating to the Native the consciousness of positive rights, not dependent on opinion or usage, but capable of being actively enforced.

It is not, I think, difficult to see how this state of the law and this condition of the Courts and Bar render it necessary for the Local Governments, as being responsible for the efficiency of their administration, to press for legislation. The nature of the necessity can best be judged by considering what would be the consequences if there were no legislation, or not enough. A vast variety of points would be unsettled until the highest tribunals had the opportunity of deciding them, and the government of the country would be to a great extent handed over to the High Courts, or to other Courts of Appeal. No court of justice, however, can pay other than incidental regard to considerations of expediency, and the result would be that the country would be governed on principles which have no necessary relation to policy or statesmanship. It is the justification of legislation that it settles difficulties as soon as they arise, and settles them upon considerations which a court of justice is obliged to leave out of sight.

The consequences of leaving India to be governed by the Courts would, in my judgment, be most disastrous. The bolder sort of officials would, I think, go on without regard to legal rule, until something like the deadlock would be reached with which we are about to deal in the Punjab. But the great majority of administrative officials,

whether weaker or less reckless, would observe a caution and hesitation for which the doubtful state of the law could always be pleaded. There would, in fact, be a paralysis of administration throughout the country.

The fact established by the Paper, that the duties created by Indian legislation are almost entirely official duties, explains the dislike of legislation which occasionally shows itself here and there in India. I must confess that I have always believed the feeling, so far as it exists, to be official, and to correspond very closely to the repugnance which most lawyers feel to having the most disorderly branch of case-law superseded by the simplest and best drawn of statutes. The truth is, that nobody likes innovations on knowledge which he has once acquired with difficulty. If there was one legislative change which seemed at the time to be more rebelled against than another, it was the supersession of the former Civil Procedure of the Punjab by the Code of Civil Procedure. The Civil Procedure of the Punjab had originally been exceedingly simple, and far better suited to the country than the then existing procedure of the Regulation Provinces. But two years ago it had become so overlaid by explanations and modifications conveyed in Circular orders, that I do not hesitate to pronounce it as uncertain and difficult a body of rules as I ever attempted to study. I can speak with confidence on the point; for I came to India strange both to the Code of Civil Procedure and to the Civil Procedure of the Punjab, and, while the first has always seemed to me nearly the simplest and clearest system of the kind in the world, I must own I never felt sure in any case what was the Punjab rule. The introduction of the Code was, in fact, the merest act of justice to the young generation of Punjab officials, yet the older men spoke of the measure as if some ultra-technical body of law were being forced on a service accustomed to courts of primitive simplicity.

It must, on the other hand, be admitted that, in creating new official duties by legislation, we probably in some degree fetter official discretion. There is no doubt a decay of discretionary administration throughout India; and, indeed, it may be said that in one sense there is now not more, but much less, legislation in the country than formerly; for, strictly speaking, legislation takes place every time a new rule is set to the people, and it may be taken for granted that in earlier days Collectors and Commissioners changed their rules far oftener than does the Legislature at present. The truth is, discretionary government is inconsistent with the existence of regular courts and trained lawyers, and, since these must be tolerated, the proper course seems to me not to indulge in vague condemnation of legislation, but to discover expedients by which its tendency to hamper discretion may be minimised. One of these may be found in the skilful drafting of our laws—in confining them as much as possible to the statement of principles and of well-considered general propositions, and in encumbering them as little as possible with detail. Another may be pointed out in the extension of the wholesale practice of conferring by our Acts on Local Governments or other authorities the power of making rules consistent with the Act—a power in the exercise of which they will be assisted by the Legislative Department under a recent order of His Excellency. Lastly, but principally, we may hope to mitigate the inconveniences of legislation by the simplification of our legislative machinery as applied to those less advanced parts of the country where a large discretion must inevitably be vested in the administrator. The power of easily altering rules when they chafe, and of easily indemnifying officials when they transgress rules in good faith, is urgently needed by us in respect of the wilder territory of India.

While I admit that the abridgment of discretion by written laws is to some extent an evil—though, under the

actual circumstances of India, an inevitable evil— I do not admit the proposition which is sometimes advanced, that the Natives of India dislike the abridgment of official discretion. This assertion seems to me not only unsupported by any evidence, but to be contrary to all the probabilities. It may be allowed that in some cases discretionary government is absolutely necessary; but why should a people, which measures religious zeal and personal rank and respectability by rigid adherence to usage and custom, have a fancy for rapid changes in the actions of its governors, and prefer a regimen of discretion sometimes coming close upon caprice to a regimen of law? I do not profess to know the Natives of this country as well as others, but if they are to be judged by their writings, they have no such preference. The educated youth of India certainly affect a dislike of many things which they do not care about, and pretend to many tastes which they do not really share; but the repugnance which they invariably profess for discretionary government has always seemed to me genuinely hearty and sincere.

APPENDIX II.[1]

G. L. v. Maurer, Einleitung zur Geschichte der Mark-, Hof-, Dorf- und Stadt-Verfassung und der öffentlichen Gewalt. München.

G. L. v. Maurer, Geschichte der Dorfverfassung in Deutschland Erlangen.

G. L. v. Maurer, Geschichte der Frohnhöfe, der Bauernhöfe und der Hofverfassung in Deutschland. Erlangen.

G. L. v. Maurer, Geschichte der Markenverfassung in Deutschland. Erlangen.

G. L. v. Maurer, Geschichte der Städteverfassung in Deutschland. Erlangen.

E. Nasse, Ueber die mittelalterliche Feldgemeinschaft und die Einhegungen des sechszehnten Jahrhunderts in England. Bonn.

G. Landau, Die Territorien in Bezug auf ihre Bildung und ihre Entwickelung. Hamburg.

G. Landau. Das Salgut. Kassel.

Ch. Lette, Die Vertheilung des Grundeigenthums in Zusammenhang mit der Geschichte der Gesetzgebung und den Volkszuständen. Berlin.

N. Kindlinger, Geschichte der deutschen Hörigkeit, insbesondere der sogenannten Leibeigenschaft. Berlin.

W. Gessner, Geschichtliche Entwickelung der gutsherrlichen und bäuerlichen Verhältnisse Deutschlands, oder practische Geschichte der deutschen Hörigkeit. Berlin.

Von Haxthausen, Ueber die Agrarverfassung in Norddeutschland. Berlin.

[1] Recent German Works bearing on the subject of the Lectures on Village-Communities.

NOTE A.[1]

'The Religion of an Indian Province' (*Fortnightly Review*, Feb. 1, 1872); 'Our Religious Policy in India' (*Fortnightly Review*, April 1, 1872); 'The Religious Situation in India' (*Fortnightly Review*, Aug. 1, 1872); 'Witchcraft and Non-Christian Religions' (*Fortnightly Review*, April 1, 1873); 'Islam in India' (*Theological Review*, April 1872); 'Missionary Religions' (*Fortnightly Review*, July 1, 1874).

I take the following passages from the 'Berár Gazetteer,' edited by Mr. Lyall:—

The cultus of the elder or classic Hindú Pantheon is only a portion of the popular religion of this country. Here in India, more than in any other part of the world, do men worship most what they understand least. Not only do they adore all strange phenomena and incomprehensible forces—being driven by incessant awe of the invisible powers to propitiate every unusual shape or striking natural object—but their pantheistic piety leads them to invest with a mysterious potentiality the animals which are most useful to man, and even the implements of a profitable trade. The husbandman adores his cow and his plough, the merchant pays devotion to his account-book, the writer to his inkstand. The people have set up tutelary deities without number, who watch over the interests of separate classes and callings, and who are served by queer rites peculiar to their shrines. Then there is an infinite army of demigods, martyrs, and saints, of which the last-named division is being continually recruited by the death, in full odour of sanctity, of hermits, ascetics, and even men

[1] Mr. Lyall's publications.

who have been noted for private virtues in a worldly career. And perhaps the most curious section of these canonized saints contains those who have caught the reverent fancy of the people by peculiar qualities, by personal deformity, by mere outlandish strangeness; or who have created a deep impression by some great misfortune of their life or by the circumstances of their death. All such striking peculiarities and accidents seem to be regarded as manifestations of the ever-active divine energy, and are honoured accordingly. Thus it is not easy to describe in a few pages the creeds and forms of worship which prevail even in one small province of India, although in this imperfect sketch nothing is mentioned but what is actually practised within Berár. This is one of those provinces in which the population is tinged throughout by the strong sediment of aboriginal races that have been absorbed into the lowest castes at bottom. . . . . Therefore it may be expected that many obscure primeval deities owned by the aboriginal liturgies, and many uncouth rustic divinities set up by the shepherds or herdsmen amid the melancholy woods, will have found entry into the Berár pantheon. Nevertheless, we have here, on the whole, a fair average sample of Hindúism, as it exists at this time throughout the greater part of India; for we know that the religion varies in different parts of this vast country with endless diversity of detail. Vishnu and Shiva, with their more famous incarnations, are of course recognised and universally honoured by all in Berár. The great holidays and feasts of the religious calendar kept by Western India are duly observed; and the forms and ceremonies prescribed by Bráhmanical ordinance are generally the same as throughout Maháráshtra. The followers of Shiva are much the most numerous, especially among the Bráhmans. . . . . .

Berár is liberally provided with canonized saints, who are in a dim way supposed to act as intercessors between mortals and the unseen powers, or at any rate to possess some mysterious influence for good and evil, which can be

propitiated by sacrifice and offering. Pilgrimages are made to the tombs of these saints, for it must be noted that a man is always buried (not burnt) who has devoted himself entirely to religious practices, or whom the gods have marked for their own by some curious and wonderful visitation. When an ascetic, or a man widely renowned for virtue, has acquired the name of a *sádhu*, or saint, he is often consulted much during his lifetime, and a few lucky prescriptions or prophecies gain him a reputation for miracle-working. To such an one do all the people round give head, from the least to the greatest, saying, as of Simon Magus, 'This man is the great power of God;' he is a visible manifestation of the divine energy which his virtue and self-denial have absorbed. The large fairs at Wadnera (Elichpúr district), Akot, Nágar Tás, and other places, took their origin from the annual concourse at the shrines of these *sádhus*. At Akot the saint is still living; at Wadnera he died nearly a century ago, and his descendants live on the pious offerings; at Jalgaon a crazy vagrant was canonized two or three years back on grounds which strict people consider insufficient. There is no doubt that the Hindú religion requires a pope, or acknowledged orthodox head, to control its wonderful elasticity and receptivity, to keep up the standard of deities and saints, to keep down their number, and generally to prevent superstition from running wild into a tangled jungle of polytheism. At present public opinion consecrates whom it likes, and the Bráhmans are perfectly tolerant of all intruders, though service at these shrines may be done by any caste. . . . . . .

The leading saints of Berár disdain any romantic origin. They have wrested from the reluctant gods, by sheer piety and relentless austerity, a portion of the divine thaumaturgic power, and it exhales after their death from the places where their bodies were laid. Donations and thank-offerings pour in; endowments of land and cash used to be made before English rule drew a broad line between religion and

revenue; a handsome shrine is built up; a yearly festival is established; and the pious descendants of the saint usually instal themselves as hereditary stewards of the mysteries and the temporalities. After this manner have the sepulchres of Srí Á yan Náth Máháráj and Hanumant Ráo Sádhu become rich and famous in the country round Umarkher. It has been said that the Hindús worship indifferently at Mahometan and Hindú tombs, looking only to wonder-working sanctity; in fact, the holy man now in the flesh at Akot has only taken over the business, as it were, from a Mahometan fakír, whose disciple he was during life; and, now that the fakír is dead, Narsing Báwa presides over the annual veneration of his slippers. . . . . . .

It may be conjectured that whenever there has arisen among this host of saints and hermits a man who added to asceticism and a spiritual kind of life that active intellectual originality which impels to the attack of old doctrines and the preaching of new ones, then a sect has been founded, and a new light revealed. And the men who have created and confirmed the great religious movements in Hindúism are not always left in the humble grade of saints; they are discovered to be incarnations of the highest deities; while the transmission of this divinity to other bodies is sometimes perpetuated, sometimes arrested at the departure of him who first received it. No such great prophet has been seen in Berár, but the votaries of some famous Indian dissidents are numerous. This is not the place to discuss their various tenets, yet their denominations may be mentioned.

INDEX.

ACCOUNTANT, village, his importance in India, 125
Administrators, Indian, their fear of altering native custom, 39
Agriculture, conditions of, in India as compared with Northern and Central Europe, 108. *See* Village Communities
Arable Mark, existence of the, in the Indian village community, 108. *See* Village Communities
Arts, faculty of, 262
Aryan Institutions, antiquity of, 211
Austin, John, his view of jurisprudence, 4
Austrian codes, their similarity to the French codes, 358

BABER, Emperor, on the monotony of life in India, 207
Benefices, origin and influence of, on feudalism, 132
Bengal, Lower, power of making a will in, 40. Decay of the village system in, 104. Lord Cornwallis's land settlement of, 105, 153. Bad reputation of the Zemindars of, as landlords, 163
Benthamism, advance of its principles, 23
Blamire, Mr., adopts the popular theory on landed property, 84
Brahminism, effects of, on older faiths, 216; influence of Brahminical literature on Europe, 219
British government in India compared with Roman government in Judæa, 233–236
Buckle, Mr., on the social condition of India, 213

CALCUTTA, origin of the city of, 118
Calcutta, University of, increase in the number of students in, 240. Want of liberality in, 248. Advancement of the new building, 276. The importance of its examinations, 277. Its success as a popular institution, 278. Encouragement of cramming in, 283
Carrying trade, influence of the, in India, 197
Caste, real nature of, in India, 56, 57. Actual character of, in India, 219
Casuists, the, philosophy of, 338
Cities, European, some probably the Township Mark of Teutonic villages, 118
Cities, Indian, causes of the growth

of villages into, 118. Origin of the formation of Indian capitals, 119. The great deserted cities, 119
Civil courts in India, 34. Appeals from the Settlement and Revenue courts to the, 34. Difference between a High and a Chief court, 35. The Supreme courts and their judicial powers, 36. Dismay caused by the introduction of English law, 38. Native and English laws compared, 49
Clan society, the Celtic form of family organisation, 156
Codes, production of, in Louisiana, 360. The study of Roman law associated with codification, 362. Two meanings of codification, 362. Difficulties of codification, 365. Meaning of codified law, 366. Tacit codification, 368
Codes, Austrian, their similarity to the French codes, 358
Codes, French, elements of Roman law in, 356. Restoration of, after the dissolution of Empire, 357
Commercial principles, primitive, 196
Common, commonable, and common fields, in England, 85. 'Stint of common,' 89. The Indian waste or common land, 120, 121. Controversy after 1857 as to waste land in India, 121. Action of the government respecting it, 122. Exotic origin of the ancient three-field English system, 200
Common-places, danger of, 255
Contract, not the source of law in primitive communities, 110. Destruction of the village system by the obligations arising out of, 113
Conveyances, ancient, of land, 188
Cornwallis, Lord, his settlement of Lower Bengal, 105, 153
Council, village, legislation of the, 116, 123. Sometimes superseded by a Headman, 122
Court Baron, authority of the Lord of the Manor in the, 134, 139
Court Leet, functions of the, 139, 140
Courts of Justice established by the English in India, 71. None in some of the semi-independent native States, 71
Cramming, its encouragement in India, 283
Custom, stability of, in India, 9. Slavery of Indians to, 13. Indian administrators and native custom, 39. Attachment of an Oriental to his local custom, 39. Varieties of native usage, 51, 52. Preservation of customary law, 55. Agencies by which this preservation has been effected, 55. Antiquity of Indian custom, 65, 66. Changes in the nature of usage, 72, 75. Origin and growth of custom, 109
Customary Manorial Courts, functions of the, 139, 140

DELHI, exactions of the Mahometan Emperors of, 179
Devises, Statute of, influence of, in throwing small properties into the hands of large landowners, 169, 170
Diderot's 'Histoire Philosophique des Indes,' 213
Distribution, failure of primitive tilling communities for securing, 166
Duff, Dr., his qualities as a missionary, 246

EDUCATION, relative priority of studies, 263. In the upper classes of India, 279. Relation of, to morality, 281. Art of teaching, 286. Superficial knowledge, 287. Native use of, 288. Present and past education in India, 289. Educated natives, 293

Elgin, Lord, death of, 246

Endowments, private, in Indian Universities, 248. In English Universities, 249

England, existence of the Arable Mark and Common Mark in, 85. Various names of the cultivated portion of the domain in, 85. True succession groups of proprietors in, 135. Waste, or common-land, has become the Lord's waste, 135. The modern legal theory of the Lord's rights, 136. Advantages of absolute property over the village community system, 162. Relation of India to, 206. Study of Roman law in, 378

English in India, their influence on legal conceptions, 69. Their unwilling assumption of sovereignty, 70. Their establishment of Courts of Justice, 71. A cause of the growth of the conception of right, 73

English law, character of, 299. Inapplicability of, 300. Influence of, in America, 359. Methods of interpretation, 374. Characteristic of English legislation, 374

Error, moral and scientific, 269

Eviction rare in India, 186

Evidence, law of, Indian legislation, 295, 297. Judicial and legislative power, 296. Nature of Hindu and Mahometan law, 298. Character and inapplicability of English law, 299 *et seq.* Influence of English judicial system, 299. Practical evils of Law of Evidence in India, 301. Circumstantial and direct evidence, 306. Facts of issue and relevant facts, 307–309. Judicial and scientific methods, 310. The scientific inquirer and the Judge, 311. The Experimentalist and the Judge, 312. Facilities which assist those engaged in judicial investigations, 312. Nature of a Law of Evidence, 314. Rules of exclusion of Evidence, 315. History of the English law of Evidence, 316, 319. Acquisition of the power of cross-examination, 318. Exception to rules of exclusion, 320. Judge and Jury, 321. Special canons of evidence, 322. Foreign systems of Evidence, 322. English rules in India, 324. Indian testimony, 326. Hearsay evidence in India, 326. Admission of irrelevant testimony, 327

Experts, legal, employment of, in England, in modern times, 170

FAMILY, the great source of personal law, 11. Formation of the Patriarchal Family, 15

Families, leading, causes of the aggrandisement of, 145

Feudalism, tendency in the primitive Teutonic system towards feudalism, 21. Origin of, 13. 132. Influence of benefices, 132. The Manor, 133. Causes of feudalisation, 142, 143. Growth of suzerainties, 144. Elements of the

feudal system, 146. Systematic feudalism, 147. Imperfect feudalisation of India, 158–160. Suffering which accompanied feudalisation in Europe, 161. Advantages which the transition of one form of property to another produced, 162. Cultivation of waste land in Europe, 162

Fiction, modern method of, 290

Freeman, Mr., his identification of fragments of ancient Teutonic society in Switzerland, 9

French codes, elements of Roman law in, 356. Restoration of, after the dissolution of Empire, 357

GAME not strictly private property according to English law, 142

Grain-dealer, the, excluded in India from privileges, 197

Grass-lands, customs of various manors respecting, 136

Grotius, treatise of, 338

HEADMAN of an Indian village, office of, 122, 155. Power which he enjoys, 155. Nature and origin of the rights claimed by certain families, 156

Hellenic origin of progress, 238

Hereditary offices, tendency among Teutonic races to, 132

Hermes, the three attributes of the god, 193

Hindu law, nature of, 298

History, the truth of, 264. Relation of Philosophy and Science to, 265–267. Influence of new methods on, 268

INCLOSURE and Inclosure Acts, importance of the history of, 85

India, village communities of, 12 *et seq.* India regarded in England as uninteresting, 22. Importance of the English conquest and government, 23. Ignorance of India discreditable in Englishmen, 23. Gradual disappearance of Indian phenomena, 24. Ignorance and superstition of Indian native society, 25. Influence of Western ideas, of physical ideas, and of British dominion, 26, 27. English compared with Indian society, 56. Influence of caste, 56, 57. Influence of English law, 74. Discovery and recognition of the existence of the Indian village community, 103. The Mahometan theory of ownership in the land, 104. Conditions of agriculture in India as compared with Europe, 108. Common or waste lands in, 120, 131. Peaceful character of the people of, 124. Their submission to the power of mercenary armies, 124. The 'outsiders' of Indian villages, 127 Shape taken by all disputes in, 128. Mode of dealing with a newly-annexed province, 149. The various land settlements and their results, 149–151. Analogy between Teutonic kings and the British government in India, 151. Mahometan assumptions, 152. The two great Indian schools of opinion respecting the functionaries administering the country, 153. Property recognised by the English, 156. Absolute ownership, 157. Comparison of English and

Indian Conditions, 159. Structure of village communities in India, 175. Exactions of Oriental sovereigns, 179. Questions about rent, 180, 181. Influence of the carrying trade in India, 197. Dulness attributed to Indian topics by Englishmen, 205. Continental sympathy for, 205. Relation of England to, 206. Political results of Oriental studies, 209. Materials for new science in, 210. The antiquities of Aryan institutions due to the isolation of the country, 211 *et seq.* Coast populations of, 213. Ignorance of English ideas of, 213. Characters of the interior of, 214. Social state of, 215. The influence of religion and caste in, 216 *et seq.* Discussions on ownership, 222. Value of Indian phenomena, 224. Modern origin of competition, 227. Comparative method and custom, 230. Difficulty of the government of, 236. Obstinacy of native prejudice, 236. English influence in, 238. Similarity between the English and Indian Universities, 241. Substitution of classical for vernacular languages in, 242. Ambition of the native student to write English, 244. Missionaries in, 246. Indian Government and private endowments, 248. Aspirations of native students, 252. Native aptitude for law, 258. Intellectual cultivation in, 272. Native imagination, 275. Education and morality in, 281. Method of teaching in, 286. Mode of acquiring knowledge, 288. Present and past education in, 289, 290. Intercourse between the races, 292. Ancient and modern India 292. Educated natives, 293. Minute on the over-legislation attributed to the English Government, 389

Indian Law, sources of, 31. Customary law, 31. Settlement, 32. The Record of Rights, 33. Displacement of native by English law, 37. Dismay with which English law was regarded, 38. Mode of administering the Hindoo code, 49–51. Varieties of native usage, 51, 52. Legislation of, 295. Law of Evidence, 302. Indian Evidence Act, 304. English rules of law in, 324. Hearsay evidence in, 326. Indian Testimony, 326

Indians, secrecy of their family life, 114. Their intellectual quickness, 56

Institutions, Aryan, antiquities of, 211

International Law, the undoubted parent of, 193. Language of, 351. History of, 352. Relation of, to Roman law, 353

Ireland, quantity of detail in the ancient Irish law, 81. The three ancient kinds of rent in, 186, 187

JUDÆA, Roman government of, compared with British government of India, 233–236

Jurisprudence, chief function of Comparative, 3, 4. John Austin's views, 4. The comparative and historical methods, 6. Instruction which India may yield to the student of historical jurisprudence, 15

Jus Gentium, influence and importance of the, 193, 194

LAING, Mr., on discoveries in philological science, 253

Lammas lands, 85. Inclosures removed on Lammas Day, 86

Land, Record of Rights in, 72. Oldest forms of property in, 76. Scarcity of laws as to the tenure of, 51. Teutonic origin of English theories of law in, 83. Unsoundness of the popular theory, 84. Importance of the history of inclosures and inclosure acts, 85. The ancient cultivated portion of the domain, and its various names, 86. Modes of redistributing the shares, 86. Effect of shifting severalties, 87. Great extent of the common fields, 88. And of the pasturage on baulks of turf, 89. Existing baulks, 89. Vestiges of the Mark, 88. Marshall's account of the ancient state of England quoted, 90–94. The Udal tenures of Orkney and Shetland, 94, 95. The 'Burgess Acres' in the burgh of Lauder, 95. Mahometan theory of ownership in land, 104. Lord Cornwallis's settlement of Lower Bengal, 105. Estates in Oudh, 105. Creation of a peasant proprietary under prosperous conditions, 105, 106. Conditions of agriculture in India as compared with Europe, 108. Customs of re-partition of the cultivated lands, 112. Common or waste lands in India, 120, 121 The process of feudalisation, 131. Benefices, 132. The Manorial group, 133, 134. Causes of the growth of suzerainties, 144. Causes in German and Scandinavian cultivating communities leading to inequality of property in land, 146. Land settlements in India, 105, 149–52. Ancient rule as to the highest obtainable rent for the use of land, 186. Ancient Irish rents, 186, 187. Primitive notions as to price, 187. Rarity of ancient transfers of land, 188. Competition-rent, 189. Exchangeableness of, in India, 228

Languages, substitution of classical for vernacular language in India, 242

Lauder, the 'Burgess Acres' in the burgh of, 95, 96. The 'Hill parts,' 96

Law, analysis of a, 66, 67. Indian conceptions of a, 68. English influence on legal conceptions, 69. Sources of, in primitive communities, 110. Training of lawyers, 256. Popularity of legal studies, 257. Native aptitude for, 258. Definition of, 259. Law of Nature 343. Legal phraseology, 344. Language of professional lawyers, 345. English technicalities, 347. Legal and legislative expression, 348. Improvement of technical language, 349. International law, 350. Language of international law, 351. English law in America, 359. Codification, 362. Meaning of codified law, 366. Interpretation of written law, 369. Imperfections of the Statute law attributed to the proceedings of parliament, 370. Council of State, 372. Legislative expression, 372. Re-

sults of amending bills, 373. English methods of interpretation, 374. Characteristics of English legislation, 374. Meaning of the word 'practical,' 376

Law, Roman, revival of interest in, 330. Contrasted with English, 331, 335. Reasons for interest in, 332. Importance of, 333. Nature of, 334. In moral and political philosophy, 341. Relation of, to international law, 352. Technicalities of, mixed up with questions of diplomacy, 354. Diffusion of, 355. The *lingua franca* of universal jurisprudence, 361. Associated with codification, 362. Difficulties of the elements of, 377. Study of, in England, 378. History of, 379. Process of, 380. Relation of, to Roman intellect, 382

Loans, nature of, in oldest Roman contracts, 188, 189

Louisiana, Code of, 360

Lubbock, Sir John, on the first steps of mankind towards civilisation, 16. On markets, 192

MCLENNAN, Mr., on civilisation, 16

Madras, success of the peasant proprietary of, 105

Mahometan law, foundation of, 49. Its interest for the jurist, 49. Nature of, 298

Mahometan theory of ownership of land, 104

Mahratta brigands, their rise against the Mahometans, 124. Exactions of their princes, 179

Manor, origin and formation of the, 133. Authority of the Lord in the Court Baron, 134. Tenemental lands and the Lord's Domain, 134. Rights of the Lord to the waste, 135. The 'right of approvement' affirmed by the Statute of Merton and subsequent statutes, 135. Modern legal theory of the Lord's rights, 136. Changes in the grass-lands, 136. The free holders of Tenemental land corresponding to the old village community, 137. Settlement of villeins, 138. The Manorial Courts, 139. Encroachments of the Lord, 141. The Manorial group better suited than the village group for bringing waste lands under cultivation, 164. Customary tillage, 165

Manorial Court, Customary power of the, 134

Manorial courts, the three, 139

Manu, Code of, 20. Influence of Brahminical theories upon the, 20. Penetrates but little among the people of India, 39. Development of Hindoo law, 46. Mode of administering it, 49–51

Mark, or township of Teutonic families, 10. System of the, 10. Vestiges of it in England, 11

Mark, the Arable, rights and duties of the ancient Teutons respecting, 79, 80. The Mark occasionally shifted, 81. Existence of the Arable Mark in England, 85

Mark, the Common, in ancient Teutonic Society, rights and duties of the, 79

Markets, origin of, 192. Association between markets and neutrality, 193. Three ideas as to, 193. Extreme rule of Market Law, 195

Rule of Market Overt, 195. Tendency of decisions of English courts towards the law of the Market, 194. Causes which have generalised a Rule of the Market, 197

Marshall, Mr. W., his account of the ancient state of agriculture quoted, 90–94

Mathematics, pure and mixed, 267

Maurer, Von, on the law of the Mark or Township, 10. On the feudal tendency of the primitive Teutonic system, 21. His inquiry into the forms of Teutonic village property, summary of his conclusions, 77, *et seq.*

Medicine, progress of, 260

Missionaries in India, 246

Moral philosophy, schools of, 337. Relation of, to jurisprudence, 342

Morier, Mr., his paper in 'System of Land Tenure in various Countries,' 78. His account of the vestiges of collective property in Germany, 78. On the aspects of the Teutonic freeman as a lord and as a commoner, 82

NASSE, Professor, on the land-law of Germany and England, 11, 17. Account of his work, 168, 169

Nature, law of, 343

Neutrality, ancient association between markets and, 193

Nuncomar, fairness of the trial of, 38

'OCCUPANCY' tenants in India, creation of, 184. Period of time required for determining who are, 184

Orkney Isles, system of the township in the, 10. Sir W. Scott on the Udal tenure, 94

Oudh, settlement of estates in, 105. Military character given to the naturally peaceful population of, 124

Ownership, absolute, of the English in India, 157–59. Indian discussions on, 222. Ancient joint-ownership, 226

PARLIAMENTARY procedure, imperfections of the Statute law attributed to, 370

Pascal's Provincial Letters, 340

Paterfamilias, the, in ancient Teutonic society, 78. His authority, 78. His relations to the other heads of families, 79. His authority in the Indian village community, 107

Peasant proprietary in India, establishment and success of the, 105

Personal Property, Law of, tendencies of, 194

Philosophy, relation of history to, 265

Police of Indian villages, recognised and paid by the British Government, 125

Political Economy, the contract of hiring and letting in, 190. The proposition which forms the basis of, 191. The Market, 192. Capable of scientific analysis and measurement, 232

'Practical,' meaning of the word, 376

Price, early history and measure of, 189

Prize of War, theoretical right of the sovereign to, 142

Production, primitive tilling communities ineffective for, 166
Property, collective, native control over testation of, 41. Its importance, 220. Theory of, 221. Indian forms of, 222. Early history of, 225 *et seq.* Several property and civilisation, 229
Pundits, consulted in the courts, 50. Charges against them, 50

RACE, modern theories of, 14
Rack-rents in ancient Ireland, 187. Generally, 187, 188. Reason why rack-rents do not exist in some places, 199
Raynal's 'Histoire Philosophique des Indes,' 213
Rent, creation and difficulties of, in India, 180, 181. Ideas of Anglo-Indians, 182. Customary and competition rents, 183. Ancient rule as to the highest obtainable rent for the use of land, 186. Rack-rents generally, 187, 188. Modern origin of the highest obtainable rent, 198. The market for land in England and Scotland, 199. Reason why rack-rents do not exist in some places, 199
Revenue courts and officers in India, and their duties, 33, 34
Roman Law, period arrived at in, 19. Revival of interest in, 330. Contrasted with English, 331–335. Reasons for interest in, 332. Importance of, 333. Nature of, 334. In moral and political philosophy, 341. Relation of, to international law, 352. Technicalities of, mixed up with questions of diplomacy, 354. Diffusion of, 355. The *lingua franca* of universal jurisprudence, 361. Associated with codification, 362. Difficulties of the elements of, 377. Study of, in England, 378. History of, 379. Process of, 380. Relation of, to Roman intellect, 382

SANSCRIT, influence of the study of, 208. Political results of its study, 209
Science, relation of History to, 266. Effects of scientific method, 269
Scott, Sir Walter, his remarks on the Udal tenures of Orkney and Shetland, 94, 95
Seignory in gross, 134
Settlement, Indian, 32. Settlement officers and their reports, 32. Record of Rights, and its importance, 33. Settlement in newly-acquired provinces in India, 149. Various forms of, 150. Mahometan assumptions, 152
Shetland Isles, system of township in the, 10. Sir W. Scott on the Udal tenure of, 94
Sikhs, exactions of the, 179
Slavery, generally, predial, and under peasants, 166
Stephen, Fitzjames, his Law of Evidence Act, 305
Students of India, aspirations of, 252
Sudder courts, powerful influence of the Supreme courts over the, 39. History of, 43. Appeals to them, 43. Judges of the, 44. Their influence, 45. Effect of judicial commentaries on the, 47
Supreme courts of India and their powers, 36. Condemnation which

they have everywhere received except in India, 37, 38. Their powerful influence on the Sudder courts, 39

Surnames, possible causes of the frequency of trades as, in England, 126

Suzerainties, causes of the growth of, 144

Switzerland, Mr. Freeman's identification of fragments of Teutonic Society in, 9

TALUKDARS, settlement of the, in Oudh, and its results, 150, 151

Teutonic society, fragments of archaic, in Switzerland, 9. Enquiries of Von Maurer, 9, 77. The Teutonic Mark, 10. The 'vicus' described by Tacitus, 10. Resemblances of Indian village communities to Teutonic townships, 12. Account of an ancient Teutonic cultivating community, 78–82. Tendency among the Teutonic races to hereditary offices, 132. Causes and results of the aggrandisement of leading families, 145

Townships, Teutonic. *See* Mark

Trades, hereditary, of Indian villages 125. Possible causes of the plentifulness and persistence of trades as surnames in England, 126

Tradition, subject of, 58. Effect of, in India, 58. Different forms of, 58, 59. Value attached just now to traditional law in India, 59

Truth, physical, value and permanence of, 271, 272. Infinity of, 273

UDAL tenures of Orkney and Shetland, 94, 95

Usury laws, effect of the repeal of the, 195

Universities, similarity between the English and Indian, 241. Mediæval, objects of the students of, 280

VICUS, the, described by Tacitus, 10

Village Communities of India, their resemblance to Teutonic townships, 12. The land-law of, 18. Decay of the village system in Lower Bengal, 40, 104. Coincidence of the systems of India and Teutonic society, 61, 62. Rights and duties, 67. Declarations of the council of village elders, 68, 69. Discovery and recognition of the existence of the Indian village community, 103. The Mahometan theory of ownership, 104. Secrecy of Indian family life, 114. Dislike of English criminal law, 115. Legislature of the council of elders, 116, 123. Their customary rules, 117. Causes of the growth of Indian villages into cities, 118, 119. Disputes sometimes decided by a single Headman, 122. Submission of naturally peaceful villagers to the power of mercenary armies, 124. The village community organised and self-acting, 125. The outsiders, 127. Power of absorption of strangers by the community, 128. Tendency of agrarian rights to decay, 150. Effect of the land settlement of Oudh, 150. The office of Headman in various

places, 155. Absolute ownership of the English, 157–59. Imperfect feudalisation of India, 158–60. The communities left to their own way by great kings and mercenary armies, 160. The cultivating community as compared with the absolute property of our own day, 164. Primitive tilling communities ineffective for securing Production and Distribution, 166. State of the servile dependents of villagers, 166. Reasons why strangers ceased to be absorbed by villagers, 167, 168. Structure of Indian village communities, 175. Divisions in the community itself, 176. Question of the right of property within the community, 177. Tradition as to rights, 178. Origin and difficulties of rent, 180, 181. Analogy of the holders of the highest rights in India to English landowners in fee simple, 184. Creation of 'occupancy' tenants, 184. Comparison of Indian and English forms of property, 185. Eviction rarely practised in India, 186

Village communities in North America, organisation of the, 201

Village communities, Teutonic, 78 *et seq.*

WASTE, or common lands, the cultivation of, demanded by a growing population, 162

Water rules in India, 109, 110

Widows, origin of the oppressive disabilities of, in Hindoo laws, 54. The written restrictions compared with unwritten usage, 55

Will, the, of Lower Bengal, 40. A modern Indian will, 41, 42. Dangers caused by the wills of unlearned testators, 170. Necessity for restraints on testamentary power, 171

ZEMINDARS, their settlement and its results, 150. Their bad reputation in Lower Bengal as landlords, 163